Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

BUFFELEN WOODWORKING CO., *et al.*,

Petitioners,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Respondent.

On Petition For A Writ Of Certiorari To The Washington Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners paid taxes under a state scheme that this Court invalidated in *Tyler Pipe Industries, Inc. v. Department of Revenue*, 483 U.S. 232 (1987) for discrimination against interstate commerce, and sued for the statutory refund held out as a remedy when the taxes were paid. The questions presented are:

1. Does the due process clause of the Fourteenth Amendment permit a state to withdraw the statutory refund remedy that was available when the taxes were paid?

2. Does the due process clause permit the state to substitute, instead of the refund remedy, a conditional "external credit" that was enacted after substantially all the unconstitutional taxes had been paid, and retroactively imposes procedural burdens only on interstate commerce?

3. Does such a tax credit scheme, without apportionment, satisfy the nondiscrimination and apportionment requirements of the commerce clause, as interpreted in this Court's decisions?

LIST OF PARTIES

Pursuant to Rule 14.1(b) the following list identifies all of the parties to the proceeding in the Washington Supreme Court, whose judgment is sought to be reviewed.

Appellants below:

A&W Bottling Co. of Seattle, Inc.; Alaska Packers Association, Inc.; Allis-Chalmers Corporation; Allis-Chalmers Hydro, Inc.; Allis-Chalmers Pump, Inc.; Alpac Corporation; Aluminum Company of America; Amcord, Inc.; American Cyanamid Company; American National Can Company; American Passage Marketing Corp.; Anheuser-Busch, Inc.; Apple Computer, Inc.; Bandag Equipment, Inc.; Bandag Incorporated; Basic American Foods; Bayliner Marine Corp.; Becor Western, Inc.; Bethlehem Steel Corporation; Bridgestone Tire Company of America, Inc.; Bridgestone USA, Inc.; Bridgestone/Firestone, Inc.; Brown & Williamson Tobacco Co.; Brunswick Corporation; Buffelen Woodworking Co.; Canada Dry Corporation; Cascade Hardwoods, Inc.; *Chrysler Motors Corporation; Clark Equipment Company; Cooper Industries, Inc.; Cooper Power Systems, Inc.; Data I/O Corporation; Del Monte Corporation; Delco Electronic Services Corporation; Down River Forest Products, Inc.; Down River International, Inc.; E.I. du Pont de Nemours & Company, Inc.; Eastman Chemical Products, Inc.; Eastman Kodak Company; Edison International, Inc.; Ford Motor Company; Frito-Lay, Inc.; G. Heileman Brewing Company; General Motors Corporation; George A.

LIST OF PARTIES – Continued

Hormel and Company; Gerber Food Products Corp.; Gerber Products Company; Gifford-Hill Company, Inc.; Hecla Mining Company; Herman Miller, Inc.; Heublein Wines; Heublein, Inc.; Hewlett Packard Company; Honeywell, Inc.; Hygrade Food Products; International Paper Company; Kal Kan, Inc.; Kimberly-Clark Corporation; Lamb-Weston, Inc.; LifeSavers, Inc.; Longview Fibre Company; Mars, Inc.; McGraw-Edison Co., Area Lighting Div.; McGraw-Edison Co., Bussman Div.; McGraw-Edison Co., Halo Lighting Div.; Mead Corporation (The); Mead Corporation (Zellerbach Paper); Mountain Safety Research; Murray Pacific Corporation; Nabisco, Inc.; Nicholson Manufacturing Co.; Noel Canning Corporation; Northern Commercial Company; Northwest Alloys, Inc.; O'Brien International, Inc.; Outboard Marine Corporation; Owens-Corning Fiberglass Corporation; Pepsi Cola Bottling Company of Everett, Inc.; Pepsico, Inc.; Pizza Hut of America, Inc.; Polaroid Corporation; Quinton Instrument Company; R.J. Reynolds Tobacco Co.; R.J.R. Foods, Inc.; Recreational Equipment, Inc.; Remington Arms; Reynolds Metals Company; Sandvik Special Metals Corporation; Scott Paper Company; Seattle FilmWorks, Inc.; Seawest Industries, Inc.; Shields Bag & Printing Co.; Shell Oil Company; Shulton, Inc.; Signode Corporation (The); Square D Company; Sun Sportswear, Inc.; Sunkist Soft Drinks, Inc.; Taco Bell Corp.; Tektronix, Inc.; Thaw Corporation; Thermo King Corporation; Tillamook County Creamery Association; Uncle Ben's, Inc.; United Vintners, Inc.; USX Corp.; *W.R. Grace & Co.-Conn.; Wagner Electric Sales Corporation; Welch Foods,

LIST OF PARTIES – Continued

Inc.; Western Bottling Company; Western Gear Corporation; Western Gear Machinery Co.; Westinghouse Electric Corporation; Xerox Corporation; York Manufacturing Company

Respondent below: State of Washington, Department of Revenue

The Rule 29.6 list of petitioners' parents and subsidiaries is set forth in Appendix E at 96a-146a.

*Chrysler Motors Corporation and W.R. Grace & Co. – Conn. were appellants below, but are not parties to this petition. *See* fn.5.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Buffelen Woodworking Co., *et al.*, respectfully request this Court to issue a writ of certiorari to review the judgment and opinion of the Washington Supreme Court, denying petitioners meaningful backward-looking relief for payment of taxes imposed under a tax scheme that this Court had previously held to be unconstitutional.

OPINIONS BELOW

The opinion of the Washington Supreme Court, reported at 973 P.2d 1011 (1999), is set forth in Appendix A at 1a to 60a. The unpublished judgments of the Superior Court for Thurston County, Washington, are set forth in Appendices B & C at 61a to 79a.

JURISDICTION

The Washington Supreme Court filed its opinion on April 1, 1999, rejecting petitioners' claim under the due process clause of the Fourteenth Amendment and the commerce clause of the United States Constitution that petitioners are entitled to a refund of taxes that this Court had held unconstitutional. That opinion became the decision terminating review by the Washington Supreme Court on April 21, 1999. Therefore, the jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the due process clause of the Fourteenth Amendment of the United States Constitution (amend. XIV, § 1) and the commerce clause of the United States Constitution (art. I, § 8, cl. 3), which are set forth in Appendix D (along with the pertinent provisions of Washington law).

STATEMENT OF THE CASE

This petition seeks review of a Washington Supreme Court decision denying petitioners a refund of taxes imposed by a Washington tax scheme that this Court declared invalid as violating the commerce clause. Petitioners are 113 businesses, each of which was taxed by Washington on gross income that it earned in interstate commerce by performing a combination of manufacturing and selling activities across state lines (including activities in the state of Washington). Each petitioner sued for a statutory refund of taxes paid under the statutory scheme that this Court declared unconstitutional in *Tyler Pipe Industries, Inc. v. Department of Revenue*, 483 U.S. 232 (1987). The suits collectively sought refunds of over $100,000,000 in taxes paid under Washington's scheme for tax periods ranging from January 1980 through November 1987.[1]

Washington's B&O Tax Scheme

Washington's business and occupation ("B&O") taxes are imposed on a taxpayer's gross income for the privilege of engaging in business activities in Washington. Wash. Rev. Code § 82.04.220 (App. 81a). The scheme takes the form of a collection of taxes imposed on various types of business activities, including manufacturing and selling. *See* Wash. Rev. Code § 82.04.240, .270 (App. 81a-82a). When first adopted, the scheme exempted intrastate manufacturers from the selling taxes. That scheme was invalidated for discriminating against interstate commerce in violation of the commerce clause. *Columbia Steel Co. v. State*, 192 P.2d 976 (Wash. 1948). In 1950, the legislature responded by switching the exemption for local manufacturers to the manufacturing tax (a cosmetic change this Court later described as "turning the B&O tax exemption

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[1] The 113 petitioners brought 51 refund suits, which the trial court consolidated into one action.

scheme inside out").[2] The 1950 scheme narrowly escaped condemnation by a 5-4 decision in *General Motors Corp. v. Washington*, 377 U.S. 436 (1964). This Court invalidated the 1950 scheme in *Tyler Pipe*, holding that Washington's tax scheme discriminated against interstate commerce, in violation of the commerce clause of the United States Constitution.

The Refund Proceedings

Petitioners paid the taxes under the scheme held unconstitutional in *Tyler Pipe*.[3] Petitioners followed Washington's statutory method for challenging unlawful taxes. Pursuant to Wash. Rev. Code § 82.32.180 (App. 85a), they timely filed refund suits in superior court. Petitioners moved for summary judgment, contending that the *Tyler Pipe* decision invalidated the taxes paid by petitioners and that petitioners were, therefore, entitled to refunds of those unconstitutional taxes. Petitioners asserted a right to the refund remedy on the basis of both the refund statute itself and the declaration of the Washington Supreme Court (when the Washington taxpayers in *Tyler Pipe* had sought refunds on remand from this Court's reversal in that case): "If the taxes were collected in violation of the constitution, then the state refund statutes would mandate refunds." *National Can Corp. v.*

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[2] *Tyler Pipe*, 483 U.S. at 236.

[3] Had taxpayers failed to pay the tax, they would have been subject to late payment penalties of up to 20 percent of the tax due (Wash. Rev. Code § 82.32.090(1)); an additional warrant penalty of five percent (§ 82.32.090(3)); interest starting at nine percent per annum (§ 82.32.050), increasing to one percent per each thirty-day period (§ 82.32.210(1)); seizure and sale of their property, both real and personal, to satisfy the amount due (§ 82.32.210(2), (4)); and revocation of their certificates of registration and, therefore, the right to conduct business in Washington (§ 82.32.215).

Department of Revenue, 749 P.2d 1286, 1287, *appeal dismissed*, 486 U.S. 1040 (1988).[4]

The trial court held that the taxes paid by petitioners were unconstitutional prior to June 23, 1987 under the decision in *Tyler Pipe*. The court further held that *Tyler Pipe* required a retrospective remedy, but denied the statutory refunds sought by petitioners. Instead of refunds, the court held that the only remedy available to petitioners was whatever relief might be provided by substituting (and applying retroactively) a credit scheme.

The credit scheme was one created by the state legislature in August 1987, after substantially all of the taxes specified in petitioners' refund complaints had been paid. Because the credit scheme did not provide any credits for petitioners, the court did not grant petitioners refunds, credits, or any other relief. The court also ruled against petitioners' contention that the tax scheme invalidated by *Tyler Pipe* remains unconstitutional (despite the 1987 amendment) because it continues to discriminate against interstate commerce and is not apportioned.

Petitioners appealed the trial court decision, which denied them refunds or any other relief, to the Washington Supreme Court. The majority of that court affirmed each of the trial court's rulings recited above as not contrary to this Court's decisions in *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990); *Reich v. Collins*, 513 U.S. 106 (1994); and *Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 442 (1998).[5] In contrast,

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[4] This *Tyler Pipe* remand decision of the Washington Supreme Court was referred to as "*National Can II*" by the court below, "*National Can I*" having been the case that this Court consolidated with *Tyler Pipe* and reversed.

[5] The majority below repudiated both the pre-deprivation and post-deprivation statutory remedies in its decision. These 113 consolidated taxpayers, who had paid the unconstitutional taxes, had sued for statutory refunds. In a companion case, Chrysler and W.R. Grace sought an injunction remedy to bar the

the dissent below reached five conclusions, each at odds with the majority decision, which are set forth in the accompanying footnote.[6]

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state's attempts to collect, after the *Tyler Pipe* decision, additional taxes under the scheme held unconstitutional in that case. Although the refund and injunction cases had not been consolidated, the court below decided them in a single opinion, declaring the credit scheme to be the exclusive remedy as to all the taxes invalidated in *Tyler Pipe*.

[6] The dissent below concluded:

> First, the multiple activities tax credit provision in the 1987 act does not establish any obligation to pay any portion of the unconstitutional tax against which the credit may apply.
>
> Second, the 1987 act is prospectively effective from August 11, 1987, not retroactive to the beginning of time. Notwithstanding the expressed legislative intent . . . to restrict taxpayer remedies for prior tax periods to credits only, section 3 does not retroactively amend the substance of the preexisting B&O tax. Therefore the constitutional deficiency is not retroactively cured even if we assume a retroactive amendment could ever resurrect an unconstitutional statute.
>
> Third, this legislative effort to deny taxpayers their clearly defined preexisting statutory remedies against payment or [for a] refund of an unconstitutional tax deprives those taxpayers their property absent that process due by not only denying them a "clear and certain remedy" for the deprivation but also employing an unconstitutional "bait and switch" tactic.
>
> Fourth, the 1987 act's tax credit scheme unconstitutionally discriminates against interstate commerce because tax credits for interstate business are nearly impossible to prove in practice; and the imposition of such a burden of proof, which depends on the tax laws of other states, is unconstitutional in theory.

The 1987 Credit Amendment, Adopted as a Remedy Below

The 1987 credit scheme was declared by the majority below to be the exclusive remedy for the taxes invalidated by *Tyler Pipe*. This scheme involves a dual system of credits – "Internal Credits" for local (intrastate) commerce[7] and "External Credits" for interstate commerce.[8] The 1987 amendment provides a 100% Internal Credit to manufacturers engaging in intrastate commerce ("local businesses"). By reporting the Washington taxes on their manufacturing and selling activities, local businesses receive the Internal Credit. Their manufacturing tax cancels out the selling tax dollar-for-dollar.

For interstate commerce to qualify for an External Credit, the interstate manufacturer must comply with the procedures, qualifications, and requirements set forth in

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> Fifth, the Washington B&O tax, a tax on gross receipts, violates the commerce clause on its face because it is not apportioned to in-state value-producing activity, but taxes out-of-state activity as well.

App. 29a (Justices Sanders and Madsen dissenting).

[7] Wash. Rev. Code § 82.04.440(2), App. 82a; Wash. Admin. Code § 458-20-19301(3), App. 89a-90a ("Internal tax credits arise from multiple business activities performed entirely within this state, all of which are now subject to tax, but with the integrated credits offsetting the liabilities so that tax is only paid once on gross receipts.").

[8] Wash. Rev. Code § 82.04.440(4), App. 83a; Wash. Admin. Code § 458-20-19301(3), App. 88a ("External tax credits arise when activities are taxed in this state and similar activities with respect to the same products produced and sold are also subject to similar taxes outside this state.").

detail in the credit law.[9] These burdens are best discussed below in the context of the reasons for granting certiorari.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons. First, the decision below is the latest instance of Washington's persistent hostility to the constitutional constraints on a state's retention of unlawful taxes (particularly those from interstate commerce), contrary to the governing decisions of this Court. Washington's courts and legislature – like those of Florida and some other states – combine to defy the requirements of the due process clause. In the face of this continuing defiance, granting the writ and reversing the decision below is necessary to ensure respect for that core constitutional right and this Court's determinations of law.

If the Court does not conclude that the due process clause, *McKesson, Reich v. Collins,* and *Newsweek* require reversal of the decision below, certiorari should be granted so that the Court can address the commerce clause questions that – judging by Washington's most recent "fix" and the decision below – were not resolved by the Court's previous decisions in this area. Washington's latest variation perpetuates its prior discrimination against interstate commerce that was held unconstitutional in *Tyler Pipe,* as well as a lack of the apportionment this Court in *Jefferson Lines* indicated is required. Some state legislatures and courts evidently interpret this Court's decisions as permitting the requirements of nondiscrimination and apportionment to be satisfied by cosmetic word changes or "virtual" credits that have no material effect in the real world.

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[9] The External Credit requirements are contained in Wash. Rev. Code § 82.04.440(4), (5), (9), App. 83a, and Wash. Admin. Code § 458-20-19301, App. 86a-95a.

I. THE DECISION BELOW SQUARELY CONFLICTS WITH THIS COURT'S DECISIONS AND SHOULD BE REVERSED.

The court below has continued its pattern of denying meaningful backward-looking relief from unconstitutional taxes imposed by the State of Washington.[10] The denial in this case was achieved contrary to this Court's decisions in *Reich v. Collins* and *Newsweek*, by substituting a credit scheme enacted in August 1987 in place of the refund remedy that was available under Washington law when petitioners paid their taxes for January 1980 through November 1987. In fact, petitioners were granted no relief whatsoever – no refund, no credit, nothing. The credit scheme that was nominally substituted for the statutory refunds does not fulfill *McKesson's* requirements for retrospective relief, because the ostensible remedy was neither "meaningful" nor in compliance with the dictates of the commerce clause. The decision below, and Washington's pattern of legislative and judicial defiance of its constitutional obligations, bear a striking and disturbing similarity to the circumstances in which this Court recognized the need to act in *McKesson*, *Reich v. Collins*, and *Newsweek*.

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[10] *National Can Corp. v. Department of Revenue*, 749 P.2d 1286, *appeal dismissed*, 486 U.S. 1040 (1988); *Digital Equip. Corp. v. Department of Revenue*, 916 P.2d 933 (Wash. 1996), *cert. denied*, 520 U.S. 1273 (1997); *W.R. Grace & Co. v. Department of Revenue*, 973 P.2d 1011 (Wash. 1999). The court below may have been emboldened in this case by its having gambled in prior cases on the difficulty of obtaining this Court's review, and having won its gamble. The questions presented here are now ripe for decision, and these decisions strongly suggest that the court below is unlikely to respond to anything but the clearest instruction from this Court.

A. Denial of a Refund Remedy Was an Unconstitutional "Bait and Switch" under *Reich v. Collins* and *Newsweek*.

The bait in this case was the state's tax refund statute, which authorized these refund suits brought by petitioners. Not only was it *a* remedy held out by Washington law, but purported to be the only judicial means available for a taxpayer "to recover any tax paid, or any part thereof." Wash. Rev. Code § 82.32.180, App. 85a.

The reasonableness of petitioners' reliance on the prescribed statutory refund remedy was confirmed by the unanimous clarion statement of the Washington Supreme Court itself, that:

> If the taxes were collected in violation of the constitution, then the state refund statutes would mandate refunds.

National Can Corp., 749 P.2d at 1287. That statement was made in the case the Washington court calls "*National Can II*," in which Washington taxpayers initially sought refunds of the taxes invalidated in *Tyler Pipe*. Despite having acknowledged the "mandate" of refunds under Washington statutory law, the Washington court denied refunds in *National Can II* by applying *Tyler Pipe* purely prospectively.

Subsequent decisions of this Court[11] enabled the Washington Supreme Court to recognize that its prospective application of *Tyler Pipe* was error. The state court thus overruled that aspect of its decision in *National Can II* and acknowledged that *Tyler Pipe* requires a retrospective remedy.[12] Nevertheless, the undeterred majority below has held fast to its original position of denying

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[11] *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993).

[12] *See Digital Equip.*, 916 P.2d at 938 (1996 Wash.).

refunds, in this case adopting the tactic that has been condemned as "bait and switch":[13]

> [W]hat a state may not do, and what Georgia did here, is to reconfigure its scheme, unfairly, in mid course – to "bait and switch," as some have described it.

Reich v. Collins, 513 U.S. at 111.

The Washington Supreme Court having previously declared that Washington statutes would "mandate" refunds, if the taxes collected were unconstitutional (as they were held to be in *Tyler Pipe*), the majority below has reconfigured its scheme in mid course to substitute illusory credits as the exclusive remedy.

Despite the clarity and vigor of its earlier pronouncement about the statutory mandate of refunds, the majority below has evaded that mandate by simply ignoring it. In the words of the dissent below:

> [N]ow the majority acknowledges *Tyler Pipe* applies retroactively (as we also held in *Digital Equip.*, 192 Wn.2d at 188) yet ignores, without

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[13] The opinion below has acknowledged that on June 23, 1987 this Court reversed the Washington court on the issue of discrimination against interstate commerce in *Tyler Pipe*, which consolidated *"National Can I."* As the Washington majority now acknowledges, this Court "remanded the case to us for a resolution of the 'remedial issues.' " App. 3a (citing *Tyler Pipe*, 483 U.S. at 253). Misconceiving the remand as allowing a choice of law rather than remedy, the Washington court erred a second time:

> On remand, we held the Supreme Court's holding in *Tyler Pipe* applied prospectively only and denied the taxpayers any refund for taxable activities before June 23, 1987, the date of the Supreme Court decision.

App. 3a. The Washington court has since been obliged to overrule *National Can II* and allow a retroactive remedy. App. 11a-12a.

> overruling, our previous holding that retroactive application of *Tyler Pipe* "mandates refunds."

App. 40a.

The switch in remedies from a refund to an ostensible credit resulted from the executive branch's 1987 proposal, and the legislature's enactment, of a credit scheme that did not exist when petitioners paid nearly all the taxes they seek to recover. Blessing "the intent of the legislature," the majority below applied that 1987 credit amendment retroactively as a nominal remedy for petitioners' payment (for tax periods from January 1980 through November 1987) of the taxes that were invalidated in *Tyler Pipe*. As the dissent below noted:

> This case falls within the constitutional "bait and switch" prohibition . . . Section 3's limitation of remedies is after the fact; it overlays these preexisting remedial statutes and clearly offends the "bait and switch" doctrine set forth in *Reich* and its progeny.

App. 41a. Just last term, this Court underscored the correctness of that conclusion: "a State may not 'bait and switch' by 'hold[ing] out what plainly appears to be a "clear and certain" post deprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists.' " *Newsweek*, 522 U.S. at 444. The court below was unmoved by this Court's pointed holding.

The efficacy of the commerce clause is affected by the decision below to a significant degree because of the decision's reach and scope; it consolidates in a single case the refund suits of 113 interstate businesses throughout the nation, which are attempting to recover over $100 million of taxes collected under a tax scheme this Court has already held unconstitutional. The decision below raises more serious constitutional concerns, however, because of the stubborn defiance of this Court's decisions by the Washington court's majority, which – despite acknowledging that two of its prior decisions denying

refunds have been reversed or overruled as contrary to decisions of this Court – persists nonetheless with a third denial tactic that has already been condemned by this Court as a "bait and switch" in violation of due process. As the dissent below ruefully observed, the only consistency in the Washington court's decision is that the Washington treasury always wins. App. 40a.

B. The "External Credit" Held Out as a Remedy Fails To Provide "Meaningful Backward-Looking Relief" as Required by *McKesson*.

This Court in *McKesson* rejected any notion that prospective relief alone suffices as a remedy for an unconstitutional tax:

> If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the state to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

496 U.S. at 31 (footnote omitted). This, Washington has failed to do.

This Court has also twice stated that even a remedy that is otherwise constitutionally adequate cannot be substituted for a refund when, "in light of the apparent applicability of the refund statute," "no reasonable taxpayer would have thought that [the substituted remedy] represented . . . the exclusive remedy for unlawful taxes." *Newsweek*, 522 U.S. at 443-44, *quoting Reich*, 513 U.S. at 111. That conclusion should be even more emphatic in this case, where the substituted remedy is not constitutionally adequate.

1. The 1987 credit imposes procedures and requirements that are a substantial burden on interstate commerce even when imposed prospectively; are impossible for petitioners to meet when imposed retroactively as a remedy; and do not provide due process.

The External Credit held out by the court below was conditioned on compliance with substantial procedures and substantive requirements, which had not been in Washington's tax laws during the tax periods in issue. The lack of notice of these procedures and requirements (which were created and imposed after the fact), in combination with the burdensomeness of the procedures and requirements themselves, were impossible for petitioners to satisfy.[14] As the dissent below observed, the majority has substituted, in lieu of refunds, a credit that is burdensome on a current basis and nearly impossible to earn retroactively:

> In order for the interstate taxpayer to avail himself of the credit, it is necessary to produce voluminous factual documentation [citing to WAC 458-20-19301(4)(d), App. 91a, and WAC 458-20-19301(9), App. 93a] from every taxing jurisdiction in America for periods increasingly remote in time, without end. As a practical matter, such record keeping is extremely difficult, even if the necessity for the records is known in advance, and nearly impossible if the requirement is imposed, as it is here, after the fact. *See General Motors Corp.*, 81 Cal. Rptr. 2nd at 548.

App. 46-48a.

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[14] The few petitioners who thought they might be able to satisfy the retroactively imposed requirements began the effort of claiming the credit. They gave it up as uneconomic, however, when the Department insisted on burdensome discovery proceedings, with costs out of proportion to the de minimis amount of the potential credit.

In *Tyler Pipe* this Court had ventured, as dicta, the supposition that a credit mechanism might serve to cure the discriminatory vice in Washington's exemption favoring local business over interstate commerce. 483 U.S. at 249. The hazard of hypothetical dicta is perhaps illustrated by the dismissal of petitioners' due process concerns by the court below, based on its perception that *"the United States Supreme Court specifically approved the credit remedy set forth in the 1987 legislation. Tyler Pipe,* 483 U.S. at 249." App. 19a (italics in original). The dissent below responded aptly as follows:

> The majority's claim is fanciful since the Supreme Court in June of 1987 certainly had no occasion to "specifically approve" legislation passed nearly two months later! To the contrary, referenced dicta in *Tyler Pipe* deals *not* with a retroactive credit in lieu of preexisting statutory remedies but with prospective credits, which might prospectively cure the Commerce Clause deficiency.

App. 43a (italics in original).

The California Court of Appeals has recently made the same point in the context of the same issue in a similar case:

> [T]he Court in *Tyler Pipe Industries* was suggesting a possible prospective statutory cure, not endorsing a credit system as an adequate retroactive remedy. As discussed earlier, the City's proposed credit does not provide "clear and certain" relief given the onerous burden it places on taxpayers to document double taxation reaching back 17 years.[15]

General Motors Corp. v. City & County of San Francisco, 69 Cal. App. 4th 448, 81 Cal. Rptr. 2d 544, 549 (1999), holding, in conflict with the Washington decision below, that

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[15] The Washington court recently pronounced the 1987 credit as the exclusive remedy for unconstitutional taxes that petitioners paid for periods ranging from January 1980 through November 1987.

refunds are constitutionally required as a remedy for San Francisco's tax, and rejecting as constitutionally inadequate the proposal of a credit scheme similar to Washington's.

Thus, as both the California Court of Appeals and the dissent below noted, this Court's *Tyler Pipe* dicta alluded to the general possibility of credits as part of a future scheme. This Court did not envision or bless the specific dual credit scheme Washington has since devised, with its phalanx of disparate conditions, procedures, limitations and burdens that block interstate commerce from the External Credit while assuring local business full enjoyment of its Internal Credit. And the dicta did not contemplate such a credit as a remedy applied retroactively to years before taxpayers had any notice of its burdens, procedures, and requirements.[16]

Washington's credit scheme is thus not "meaningful," but meaningless when applied retroactively as an ostensible remedy. The remedy below is also inadequate because it does not comport with any of the three alternatives this Court specified in *McKesson* as the permissible retrospective cures for a discriminatory tax scheme: (1) refund the tax revenues to the extent they were discriminatory; (2) assess and collect back taxes from the beneficiaries of the discrimination (if consistent with other constitutional limitations); or (3) effect a nondiscriminatory combination of a partial refund and a partial retroactive assessment. 496 U.S. at 40-41. Washington did not apply the credits for tax periods prior to the *Tyler Pipe* decision (June 1987) as to

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[16] Using a simplistic example, a company with manufacturing plants in the Midwest and in California can supply the Washington market from either or both. Many companies have no business reason for tracing which of the plants in fact supplies the Washington market. Developing a system to capture such information and creating such records (to be maintained for five years) are just one item in the list of burdens imposed newly and solely as part of Washington's 1987 credit.

intrastate commerce (the beneficiaries of the discriminatory scheme invalidated in *Tyler Pipe*), or as to anyone else except, nominally, petitioners. This Court in *McKesson* rejected such a remedy as constitutionally inadequate.[17]

2. The court below granted petitioners no relief.

Petitioners paid Washington over $100,000,000 of the taxes that were invalidated as unconstitutional by *Tyler Pipe*. The court below accorded these 113 manufacturers cumulative relief of zero.[18] Attempting to justify the result,

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[17] The Court said in *McKesson*:

> Respondents suggest that, in order to redress fully petitioner's unconstitutional deprivation, the State need not actually impose a constitutional tax scheme retroactively on all distributors during the contested tax period. Rather, they claim, the State need only place petitioner in the same tax position that petitioner would have been placed by such a hypothetical scheme. . . .
>
> We implicitly rejected this line of reasoning in *Montana National Bank* and *Bennett*, and we expressly do so today.

496 U.S. at 41-42. Such a scheme was rejected by this Court even though it would have placed the victim of discrimination in the same tax position as a hypothetical, but constitutional, tax scheme. In contrast, Washington's credit remedy does not even achieve that.

[18] In a companion case, in which two manufacturers sought injunctive action against collection of the unconstitutional tax, comparatively minuscule relief was obtained by the credit. Chrysler Corporation obtained a credit of $120,000 (in relation to unconstitutional taxes of $4,000,000 paid or assessed), but only after strenuous discovery, including document production and the deposition of a tax executive. The other taxpayer seeking injunction, W.R. Grace & Co., tried but failed to receive a credit. *See* App. 48a, n.21, for a description of Grace's effort and its defeat.

the majority focused exclusively on the petitioner's opportunity to challenge the tax,[19] disregarding *McKesson's* mandate of a clear and certain remedy to make the opportunity meaningful:

> To satisfy the requirements of the Due Process Clause, therefore, in this refund action the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a "clear and certain remedy" . . . for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one.

496 U.S. at 39 (citation omitted). *McKesson* further explained that to be meaningful the remedy must produce actual results:

> [O]nly an *actual* refund (or other retroactive adjustment of the tax burdens borne by petitioner and/or its favored competitors during the contested tax period) can bring about the *nondiscrimination* that "prompt injunctive relief would have achieved."

Id. at 43 (emphasis in original). Permitting the decision below to stand would countenance the Washington court's conclusion, in direct conflict with *McKesson*, that zero relief in fact qualifies as the "meaningful" relief that due process requires.

3. The 1987 credit, discriminating against interstate commerce both facially and in practical effect, offends the commerce clause.

McKesson requires that any retroactively imposed reformulation of a discriminatory tax scheme "create in

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[19] "The taxpayers here have not been deprived of the opportunity to challenge the Washington B&O tax scheme, as the taxpayers' many appearances before us challenging Washington's B&O tax attest." App. 18a.

hindsight a nondiscriminatory scheme." 496 U.S. at 40. The 1987 credit system, however, continues to discriminate against interstate commerce.

a. The facial discrimination of the 1987 credit.

The profound disparities in the actual benefits conferred under what Washington's regulation terms the "internal credit" for local commerce and the "external credit" for interstate commerce, are the product of their facial disparities – in structure, burdens, and benefits.

Internal Credit. The procedure for claiming the Internal Credit is straightforward and simple for local businesses. Local business reports its tax for manufacturing on one line of its tax return and its selling activities on another line, then qualifies for the Internal Credit automatically. The entire tax paid on its manufacturing is credited against, and cancels out, the tax nominally imposed on its selling activity. If the entire manufactured volume is sold in Washington, the credit will eliminate 100% of the selling tax. This internal credit scheme for local business is essentially unchanged from its pre-*Tyler Pipe* form.[20]

External Credit. The External Credit – conceived by the Washington legislature as a purported "cure" for the discrimination condemned in *Tyler Pipe* – has been adopted by the majority below as the exclusive retrospective remedy for that discrimination. The External Credit, however, imposes on its face significantly greater burdens than the Internal Credit, and conferred no benefit on petitioners. The disparity accounts for the zero retrospective relief for these petitioners.[21]

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[20] Cosmetic differences are that the current "credit" was then called an "exemption" and the automatic canceling of tax occurred as the selling tax canceled the manufacturing tax.

[21] Interstate manufacturers as a whole, even when applying the credit on a current year basis (rather than retroactively as a

These facial disparities between the Internal and External Credits begin with procedural burdens imposed on interstate commerce that are not borne by local business.

First, as contrasted with the automatic Internal Credit that local business receives when reporting both a manufacturing and a selling tax, interstate business must make a screening analysis of "[o]ther states' qualifying taxes" in every jurisdiction (state and municipal) where an External Credit claimant does business. Wash. Admin. Code § 458-20-19301(5), App. 92a. As the Washington regulation admonishes:

> The burden rests with the person claiming any [credit] for other states' taxes paid to show that the other states' tax was a tax on gross receipts as defined herein.

Id., App. 92a. Strict criteria for qualification of the other states' taxes exclude the vast majority of other states' taxes.

Second, in the limited instances when a credit is available, it comes only at a high cost in compliance and documentation procedures that are not borne by local business. Wash. Admin. Code § 458-20-19301(9), App. 93a. Six categories of documents and data are listed by the

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remedy), have not fared much better than petitioners. For example, in 1993 local businesses in Washington received selling tax credits of approximately $140 million, roughly equal to the total manufacturing taxes paid by local businesses. In contrast, all interstate businesses combined received tax credits of only $1.5 million in 1993. They received even less in prior years:

Year	Total Credits Received by Interstate Businesses
1988	$1.0 million
1989	$1.1 million
1990	$0.7 million
1991	$0.6 million
1992	$0.7 million

regulation that must be created and preserved by persons claiming External Credits. Even an abbreviated summary of the six categories gives a sense of the extent of the burdens borne by claimants of the External Credit, but not by local commerce receiving the automatic Internal Credit. These include: (a) sales contracts or other indicia of sales agreements showing the origin and destination state of products; (b) shipping or other delivery documents reconcilable with the selling documents referenced in (a) above; (c) documents reflecting intercompany or interdepartmental movement of product where no sale has occurred; (d) copies of tax returns showing taxes paid for which credit is claimed; (e) proofs of actual tax payment to the other states; (f) copies of other states' taxing statutes. As the regulation warns, failure to keep and preserve proofs for five years of entitlement to the credit will result in the denial of credits claimed. Wash. Admin. Code § 458-20-19301(9)(g); App. 94a.

These procedures and requirements burden all interstate commerce. As to these petitioners, there is an additional disparity imposed by the majority opinion below. Bearing the burdens of screening other states' taxes for External Credit qualification and attempting to create or obtain the requisite documentation on a retroactive basis is a burden borne only by taxpayers who have suffered the discrimination condemned in *Tyler Pipe*. It is a burden that has never been imposed on any local business.

The external credit scheme, when applied retroactively as the exclusive remedy for petitioners, awarded petitioners zero External Credits – as the only remedy for having paid over $100,000,000 of unconstitutional Washington taxes. Local businesses, with exactly the same dollar volume and the same amount of taxes paid to Washington, would have received $100,000,000 in dollar-for-dollar Internal Credits. These results can best be understood in the context of the structure of Washington's tax scheme.

b. The facial, structural discrimination of the Washington scheme.

Washington's scheme adopts two fictions that are always false and are mutually inconsistent: (1) Washington pretends that 100% of a manufacturer's gross income is attributable entirely to its manufacturing activities. (2) Washington pretends that 100% of a manufacturer's gross income is attributable entirely to its selling activities. In reality, a manufacturer engages in a combination of manufacturing and selling activities, which together produce gross income.[22] Washington then compounds the fallacy of its fictions by applying them simultaneously – purporting to tax a manufacturer separately on two portions of a single enterprise producing only one set of gross income. It purports to tax both the privilege of manufacturing a product and also the privilege of selling it – both taxes measured by 100% of the same gross income.

If Washington were to apply its fictions to intrastate manufacturers (those both manufacturing and selling an item in Washington), those local manufacturers would have to pay two taxes on the same gross income (since that income is the joint product of both the taxpayer's manufacturing activities and its selling activities). Therefore, Washington's schemes have always employed some device to prevent these fictions from impacting local manufacturers. The scheme has always automatically forgiven local businesses the tax on one of their activities.[23]

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[22] This court has long recognized that manufacturing and selling both contribute to a company's income: "The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut, and ending with sale in other states." *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 120 (1920).

[23] There has never been any real change in the device, only cosmetic changes (calling the former "exemption" a "credit" and switching its application between the selling end and the manufacturing end of the business enterprise).

The result of these devices is that a local manufacturer actually pays tax on only 50% of the tax base on which Washington's statutes nominally impose tax. But none of Washington's schemes (including the latest one) has produced the same result for interstate manufacturers. Under the latest version, interstate manufacturers are entirely dependent on the discriminatory External Credit for relief. As a result of its ineffectiveness, petitioners have had to pay tax on 100% of the tax base on which Washington's statutes nominally impose tax. In other words, the supposed or stated tax base is only nominal for local manufacturers (their real base is 50% of that stated); but the stated base is what interstate manufacturers have actually had to pay. The facial disparities in qualifying procedures between the Internal and External Credits result in a practical economic effect that is just as flagrant. As the dissent below observed:

> Thus, as a practical matter, the in-state taxpayer enjoys an automatic 100 percent credit whereas the interstate taxpayer is lucky to recoup 1 percent, if that.[24]

App. 48a.

Inherent in this structure of Washington's tax schemes are three constitutional defects: (1) The scheme discriminates against interstate manufacturers, because they actually have to pay 100% of the tax to which they are nominally subject, while local manufacturers actually have to pay only 50% of that tax.[25] (2) Washington taxes the

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[24] This is a case where the well-articulated dissent of two justices below could suffice as a petition to this Court for these petitioners. Petitioners respectfully submit that the dissent deserves the most careful attention.

[25] That is true whether the interstate company is manufacturing in Washington and selling in other states, or manufacturing in other states and selling in Washington. As Washington has adjusted its scheme over the years, it really has not mattered whether Washington excused intrastate

business activities that interstate manufacturers conduct in other states, because they have been required to pay tax on 100% of the gross income that is produced jointly by their activities in other states and in Washington. (3) The scheme subjects interstate manufacturers to the risk of multiple tax burdens, because Washington taxes 100% of the gross income produced in part by the manufacturer's activities in other states (manufacturing, selling, or both), which income the other states have the right to tax.[26]

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manufacturers from the manufacturing tax or the selling tax. Either way, the result has been identical throughout the successive variations of Washington's scheme – when the local manufacturer's accounts were settled with the state, it actually paid tax on only 50% of its nominal statutory tax base while its competitors who were interstate manufacturers paid Washington tax on 100% of their statutory tax base. This half-price deal Washington continues to give its local intrastate manufacturers discriminates against all interstate manufacturers who are not given the same half-price deal. That includes all the petitioners in this case.

[26] The other states nearly always exercise their right to tax the income produced by interstate manufacturers' activities in their states. Most other states impose their taxes in forms that are not identical to Washington's tax and which, therefore, do not qualify for Washington's "External Credit." Washington's exclusionary qualifications for its External Credit, together with the compliance procedures and burdens placed only on interstate taxpayers, result in the credits being a sham – merely camouflage or window dressing that did nothing to reduce the discriminatory burden on petitioners, nor on the vast majority of interstate manufacturers. The External Credit statute expressly disqualifies the franchise and income taxes most states use to perform the same taxing function as Washington's tax; their taxes apply a higher rate to a base that allows more deductions. The Court has held that distinction without constitutional significance. *See, infra,* n.31. Moreover, those details (a matter of individual state prerogative) do not change the fact that Washington may not constitutionally tax the portion of gross income that is produced by the taxpayer's

All these forms of discrimination against interstate commerce render the 1987 credit scheme repugnant to both the due process clause and the commerce clause, and bring the decision below in direct conflict with this Court's decision in *McKesson*. The Court emphasized there that a remedial scheme cannot discriminate against interstate commerce. 496 U.S. at 41.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A QUESTION LEFT OPEN BY THE COURT'S EARLIER DECISIONS: DOES AN UNAPPORTIONED TAX ON THE GROSS INCOME OF INTERSTATE MANUFACTURERS VIOLATE THE COMMERCE CLAUSE REQUIREMENT OF FAIR APPORTIONMENT?

Washington's taxes on manufacturing and selling in interstate commerce are not apportioned. It is likely that the only effective "cure" for Washington's repeatedly condemned[27] tax scheme would be to correct an archaic fragment of this Court's commerce clause jurisprudence, for which the decision below is an apt vehicle. A recent decision of the Court has prompted the nation's leading state

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activities in other states. Even if the other states chose not to tax an interstate manufacturer at all on its activities in those states, Washington's taxation of 100% of gross income produced partly in other states is impermissible extraterritorial taxation. That vice emphasizes the soundness of the Court's having "categorically rejected" the notion that a taxpayer must show multiple taxation: "The facial unconstitutionality of Washington's gross receipts tax cannot be alleviated by examining the effect of legislation enacted by its sister States." *Tyler Pipe*, 483 U.S. at 242. " 'The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment.' " *Id.* at 242 n.11, *quoting Armco, Inc. v. Hardesty*, 467 U.S. 638, 645 n.8 (1984).

[27] *See, supra*, pp. 7-8 and n.10.

tax scholars to declare anew: "If the Washington taxes were properly apportioned, all of the defects identified by the Court would disappear." Walter Hellerstein, Michael J. McIntyre & Richard D. Pomp, *Commerce Clause Restraints on State Taxation after* Jefferson Lines, 51 Tax L. Rev. 47, 99 (1995).[28]

Four decades ago this Court declared a century of its jurisprudence in the commerce clause area a "quagmire" and acknowledged a " 'need for clearing up the tangled underbrush of past cases.' " *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457 (1959), *quoting Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 445 (1940). The Court made substantial progress on that task nearly two decades later in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). That decision rejected the formalisms of the past in favor of examining the practical economic effects of state tax schemes within the framework of a four-part test. Petitioners assert that Washington's credit scheme, applied as their sole remedy below, violates the nondiscrimination and fair apportionment requirements of the four-part test.[29]

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[28] Recognizing the need to apportion Washington's tax also confirms refunds as the remedy mandated by this Court in this circumstance:

> Had the [tax been invalid] because . . . it was beyond the State's power to impose, as was the unapportioned tax in *O'Connor*, . . . no corrective action by the State could cure the invalidity of the tax during the contested tax period. The State would have had no choice but to "undo" the unlawful deprivation by refunding the tax previously paid under duress, because allowing the State to "collect these unlawful taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the Fourteenth Amendment."

McKesson, 496 U.S. at 39 (citations omitted).

[29] Petitioners raise no issue concerning the other two requirements.

Apportionment ensures that a state does not tax value created by activity outside its borders. *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 780 (1992) (the commerce clause imposes a "necessary limit on the State's authority to tax value or income that cannot in fairness be attributed to the taxpayer's activities within the State.") A tax that is not fairly apportioned subjects interstate commerce to a risk of multiple taxation. *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 311 (1938).[30]

One vestige of the "tangled underbrush" has remained extant: Apportionment has not been required of certain taxes on gross income from interstate activities. The Court has previously upheld Washington's unapportioned tax on income from wholesaling activities, but has not addressed apportionment of its tax on income from manufacturing activities. *Tyler Pipe*, 483 U.S. at 248 n.16 & 251; *but see J.D. Adams, infra*; *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 190 (1995).

Washington's failure to apportion these taxes is, conceptually, a narrow exception to the general rule of *Complete Auto Transit* requiring fair apportionment. Generally, Washington's gross receipts tax is required to be apportioned under precedent of this Court (and has been apportioned virtually since its inception). *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939). In practical terms, however, the conceptually narrow exception for interstate manufacturing and selling is significant because these

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[30] The Court explained:

> The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured.

304 U.S. at 311.

activities are at the heart of interstate commerce. The issue is important to commerce clause jurisprudence nationally because business taxes on gross income from manufacturing and selling are imposed by several states and numerous municipalities, including many major cities. Hellerstein, McIntyre & Pomp, 51 Tax L. Rev. at 77.

The foundation for eliminating this last vestige of commerce clause "underbrush" was recently laid by this Court in *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), and by two state supreme courts whose decisions follow it. In *Jefferson Lines*, the Court held that Oklahoma could impose a retail sales tax, without apportionment, on the consumer of a ticket for interstate bus travel measured by the entire price of the ticket. In so holding, the Court expressly distinguished its decision in *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948), "which held unconstitutional an unapportioned state tax on the gross receipts of a company that sold tickets for interstate bus travel." *Jefferson Lines*, 514 U.S. at 179 (footnote omitted). The gross receipts tax on the seller in *Central Greyhound* was understood "to be simply a variety of tax on income, which was required to be apportioned to reflect the location of the various interstate activities by which it was earned." *Id.* at 190.[31]

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[31] This Court has long recognized that there is no constitutional distinction between taxes like Washington's and taxes directly on income:

> [W]e may lay on one side the question whether this is an excise tax purporting to be measured by the income accruing from business within the state, or a direct tax upon that income; for "the argument upon analysis resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under the Federal Constitution."

Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 120 (1920) (citation omitted).

Earlier, Justice Brennan had recognized that Washington's tax subjects interstate taxpayers to the prohibited risk of multiple taxation because of its failure to apportion the gross receipts taxed:[32]

> [I]t is the commercial activity within the State, and not the sales volume, which determines the State's power to tax, and by which the tax must be apportioned. . . . [I]f commercial activity in more than one State results in a sale in one of them, that State may not claim as all its own the gross receipts to which the activity within its borders has contributed only a part. Such a tax must be apportioned to reflect the business activity within the taxing State. . . . Since the Washington tax on wholesales is, by its very terms, applied to the "gross proceeds of sales" of those "engaging within this state in the business of making sales at wholesale," it cannot be sustained under the standards required by the Commerce Clause.

General Motors, 377 U.S. at 450-51 (Brennan, J., dissenting) (citations omitted).[33]

Scholars have hailed *Jefferson Lines* as signaling the end of the archaic and misconceived view that excludes apportionment of gross receipts taxes on interstate manufacturing and selling activities:

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[32] As this Court observed in *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 374 (1991):

> [L]abeling [a tax as] a tax on "business activity" does not permit us to forego examination of the actual tax base and apportionment provisions. "A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes." Jenkins, *State Taxation of Interstate Commerce*, 27 Tenn. L. Rev. 239, 242 (1960).

[33] The Court reversed *General Motors* on other grounds in *Tyler Pipe*, 483 U.S. at 248.

> After *Jefferson Lines*, gross receipts taxes on interstate transactions should not be exempted from the apportionment requirement on the basis of a false analogy to retail sales taxes. . . .
>
> . . . [C]ases like *General Motors, Standard Pressed Steel* and *Tyler Pipe* are problematic, because they approved unapportioned gross receipts taxes measured by values reflecting interstate activity. . . . After *Jefferson Lines*, the constitutionality of these taxes is suspect.

Hellerstein, McIntyre & Pomp, 51 Tax L. Rev. at 97-98 (footnotes omitted).[34] In an age when companies' selling activities are conducted jointly by corporate, regional, district, and local offices in multiple states, the notion that interstate selling is a separate activity conducted wholly within Washington is an untenable fiction, inconsistent with the concerns underlying the apportionment requirement. As Hellerstein, McIntyre and Pomp explain:

> A state should not be allowed to parlay a local hook called wholesaling into taxing activities that took place elsewhere.
>
> . . . Requiring that Washington gross receipts tax be apportioned would have eliminated the

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[34] The reference to "false analogy to retail sales taxes" refers to a misconception indulged by the Court in the past, that gross receipts taxes are like sales taxes, presumably because they often have the same measure. A series of decisions culminating in *Tyler Pipe* permitted Washington's failure to apportion its taxes on gross income from interstate wholesaling activities (although *Tyler Pipe* invalidated Washington's tax for discrimination), explaining:

> Thus, the activity of wholesaling – whether by an in-state or an out-of-state manufacturer – must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax.

Tyler Pipe, 483 U.S. at 251.

> discrimination with which the Court was concerned.

Id. at 100.

Two state supreme courts have already applied the *Jefferson Lines* clarification and required apportionment of gross receipts taxes on selling and manufacturing businesses, respectively: *M & Associates, Inc. v. City of Irondale*, 723 So. 2d 592 (Ala. 1998); *City of Winchester v. American Woodmark Corp.*, 471 S.E.2d 495 (Va. 1996). Thus, the majority opinion below represents a split of authority among the states on this important commerce clause question.

Curing Washington's discrimination by requiring apportionment of income earned by multistate manufacturing and selling activities (as the decision in *Gwin, White & Prince* already does for other activities) will complete the work this Court began in *Northwestern States Portland Cement Co.*, and advanced in *Complete Auto Transit*. This case presents an opportunity to resolve at last the chronic discrimination of Washington's B&O tax scheme by applying to it the Court's recent analysis in *Jefferson Lines*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 30, 1999

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

W.R. GRACE & CO. – CONN.; and CHRYSLER MOTORS CORPORATION, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Respondent.	No. 64335-1 En Banc
BUFFELEN WOODWORKING COMPANY, et al., Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Respondent.	No. 65608-8 En Banc (Filed April 1, 1999)

TALMADGE, J. – This is our sixth,[1] and hopefully final, decision in the recent round of cases on the

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[1] *Tyler Pipe Indus. Inc. v. Department of Revenue*, 105 Wn.2d 318, 715 P.2d 123 (1986), *rev'd*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987); *National Can Corp. v. Department of Revenue*, 105 Wn.2d 327, 732 P.2d 134 (1986) (*National Can I*), *rev'd*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987); *National Can Corp. v. Department of Revenue*, 109 Wn.2d 878, 749 P.2d 1286, *cert. denied*, 486 U.S. 1040, 108 S. Ct. 2030, 100 L. Ed. 2d 615

constitutionality of Washington's Business and Occupation (B&O) tax on interstate manufacturers and sellers. Yet again, we are asked if the United States Supreme Court opinion in *Tyler Pipe* applies retroactively and, if so, what remedies are available to taxpayers who paid B&O taxes under the unconstitutional tax scheme identified by the United States Supreme Court in that decision, particularly for those periods prior to June 23, 1987, the date of the issuance of the Court's opinion. We are also asked to decide if the various taxpayers (taxpayers) in these cases have standing to request relief or whether their cases are barred under principles of issue/claim preclusion.

Our prior decisions resolve the core issues in these cases. The holding of the United States Supreme Court in *Tyler Pipe* applies retroactively. Similarly, the legislative remedy for the unconstitutionality of Washington's B&O tax system enacted in 1987[2] providing credits to those who paid the constitutionally defective tax applies retroactively as well. In light of our resolution of these issues, we do not reach the Department of Revenue's (DOR) standing or issue/claim preclusion issues, preserving those questions for trial court resolution on remand, as may be necessary.

ISSUES

1. Does *Tyler Pipe* apply retroactively?

2. Do taxpayers assert any viable grounds for revisiting the issue of the constitutionality of Washington's B&O tax scheme?

(1988) (*National Can II*); *American Nat'l Can Corp. v. Department of Revenue*, 114 Wn.2d 236, 787 P.2d 545, *cert. denied*, 498 U.S. 880, 111 S. Ct. 213, 112 L. Ed. 2d 173 (1990) (*American Nat'l Can*); *Digital Equip. Co. v. Department of Revenue*, 129 Wn.2d 177, 916 P.2d 933 (1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 2452, 138 L. Ed. 2d 210 (1997) (*Digital*).

[2] Laws of 1987, 2d Ex. Sess., ch. 3.

FACTS

The facts surrounding the constitutionality of Washington's B&O tax on interstate sales and manufacturing under the Commerce Clause of the United States Constitution have been amply discussed in our numerous prior opinions. We recount the specific facts of the taxpayers involved in these cases.

W.R. Grace (Grace) and Chrysler Corporation (Chrysler) were among a group of 71 taxpayers seeking refunds of B&O taxes in *National Can* I, claiming that the taxes they had paid violated the Commerce Clause. On June 23, 1987, the United States Supreme Court reversed in part and affirmed in part our decisions in *Tyler Pipe* and *National Can* I. *Tyler Pipe Indus., Inc. v. Department of Revenue*, 483 U.S. 232, 240, 107 S. Ct. 2810, 2816, 97 L. Ed. 2d 199 (1987). The Court held that the "multiple activities exemption" in RCW 82.04.440 discriminated against interstate commerce, *Tyler Pipe*, 483 U.S. at 240-48, but only partially invalidated the State's tax scheme, rejecting taxpayers' nexus and apportionment challenges to Washington's B&O tax, as we did. *Id.* at 248-51, 253; *cf. National Can* I, 105 Wn.2d at 340-42; *Tyler Pipe*, 105 Wn.2d at 322-27; *see also American Nat'l Can*, 114 Wn.2d at 248. The Court remanded the case to us for resolution of the "remedial issues." *Tyler Pipe*, 483 U.S. at 253. On remand, we held the Supreme Court's holding in Tyler Pipe applied prospectively only and denied the taxpayers like Grace and Chrysler any refunds for taxable activities before June 23, 1987, the date of the Supreme Court decision. *National Can* II, 109 Wn.2d at 895. The United States Supreme Court dismissed the taxpayers' appeals from that decision. *Tyler Pipe*, 486 U.S. 1040 (1988).

On August 11, 1987, Governor Booth Gardner signed a two-way credit law, the multiple activities tax credit (MATC), which was designed to eliminate the constitutional defects in Washington's B&O tax identified by the Supreme Court in *Tyler Pipe*. Laws of 1987, 2d Ex. Sess.,

ch. 3. Under the new law, all persons engaged in manufacturing activities in Washington must pay a manufacturing tax. All persons engaged in selling in Washington must pay a selling tax. Persons paying a selling tax may take a credit against that tax for any manufacturing tax paid to Washington or any other jurisdiction on the same product. In addition, persons paying a manufacturing tax and selling out-of-state can take a credit against that tax for any selling tax paid on the same product. Section 3 provided such credits were the exclusive remedy available to taxpayers in the event a court should deem relief appropriate regarding the former multiple activities exemption for any tax periods before the August 12, 1987 effective date of the law.[3]

Grace and Chrysler, along with many other taxpayers, next challenged the 1987 two-way credit law, as well as the retroactive application of the two-way credit to the seven-week "interim period" from June 23, 1987 through August 11, 1987, claiming the 1987 law "discriminates against interstate commerce, violates principles of equal protection, and violates their right to due process of law." *American Nat'l Can*, 114 Wn.2d at 241. In *American Nat'l Can*, we upheld the MATC and applied it retroactively to the interim period. We rejected the argument that because interstate taxpayers claimed only $1.3 million in credits between June 1987 and October 1988, the 1987 law had no practical effect. *Id.* at 240, 246-47.

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[3] If it is determined by a court . . . that relief is appropriate for any tax reporting periods before the effective date of this act, in respect to [the multiple activities exemption] as it existed before the effective date of this act, it is the intent of the legislature that the credits . . . shall be applied . . . and that relief . . . be limited to the granting of such credits.

Laws of 1987, 2d Ex. Sess., ch. 3, § 3.

In this most recent litigation, DOR imposed three final tax assessments against Grace, covering tax periods from January 1980 through December 1990, for unpaid taxes and interest. Grace filed a complaint in superior court for declaratory judgment, injunctive relief, and recovery of damages against the Governor, the Attorney General, the Director of DOR, and DOR, contending to the extent the defendants were seeking to collect B&O taxes for periods through June 23, 1987, the defendants were seeking to collect unconstitutional taxes in light of *Tyler Pipe*. Grace later voluntarily dismissed the three individual defendants. DOR answered, asserting affirmative defenses of issue preclusion based on Grace's involvement in *National Can* II and *American Nat'l Can*. DOR also pleaded a counterclaim for unpaid taxes, penalties, and interest.

Similarly, DOR assessed Chrysler for unpaid taxes and interest covering tax periods from January 1984 through June 1988. Chrysler timely filed an administrative appeal of the assessments, which under RCW 82.32.160 automatically prevented the assessments from becoming final until DOR acted on the appeal. While the administrative appeal was still pending, Chrysler filed a superior court action similar to Grace's seeking declaratory judgment, injunctive relief, and recovery of damages against the Attorney General, the Director, and DOR, and then subsequently withdrew its administrative appeal. Chrysler later filed an amended complaint seeking relief against DOR only, alleging Commerce Clause violations similar to those made by Grace. DOR again asserted issue preclusion based on Chrysler's participation in *National Can* II and *American Nat'l Can*, and sought unpaid taxes, interest and penalties by counterclaim.

All of the parties filed motions for partial summary judgment. DOR sought dismissal of all claims based on issue preclusion, while the taxpayers' motions sought application of *Tyler Pipe* retroactively from its June 23,

1987 release date, and invalidation of B&O taxes imposed before and after such date. The trial court issued detailed memorandum opinions in the two actions applying *Tyler Pipe* retroactively, upholding the constitutionality of the 1987 MATC legislation and applying it retroactively, and remanding the cases to DOR to recompute the taxpayers' assessments in order to retroactively apply the two-way credit found at RCW 82.04.440. The trial court denied DOR's motions as to issue preclusion. The parties moved for reconsideration with Grace and Chrysler specifically arguing no penalties should be imposed against them.[4] In the meanwhile, our *Digital* decision was issued. The trial court requested additional briefing on the effect of the *Digital* decision. The trial court ultimately denied the parties' motions for reconsideration, ruled no penalties would be included in DOR's money judgments against the taxpayers, but that interest may be assessed, and concluded *Digital* confirmed its earlier ruling that *Tyler Pipe* applied retroactively. The various parties' appeals are now before us.

In December 1984, Buffelen Woodworking Company (Buffelen) filed a complaint in Thurston County Superior Court for refund of B&O taxes paid since January 1980 in violation of the Commerce Clause. Buffelen's action was one of nearly 100 similar refund actions filed that month alone in Thurston County Superior Court. *National Can* I, 105 Wn.2d at 329. More than 300 similar refund actions were originally filed between 1984 and 1990. In December 1993, plaintiff taxpayers in 104 of the remaining refund actions moved to consolidate the actions. DOR opposed

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[4] The taxpayers filed notices of appeal to this Court in July 1996, long before the trial court heard argument on the parties' respective motions for reconsideration. We consolidated the cases on appeal and stayed all appellate procedures until the trial court resolved the motions for reconsideration.

the motion, but the trial court granted consolidation of 103 of the cases under the *Buffelen*[5] caption.

The taxpayers in the consolidated actions filed a joint motion for partial summary judgment contending *Tyler Pipe* retroactively invalidated taxes paid by appellants prior to June 1987 and they were entitled to full refunds of any unconstitutional taxes they might have paid. DOR moved to strike certain evidence offered in support of the taxpayers' motion.

Relying on its ruling in *Grace* and *Chrysler*, the trial court entered orders similar to its orders in those cases ruling that *Tyler Pipe* should be applied retroactively, but that refunds for pre-*Tyler Pipe* tax periods would be limited to credits for gross receipts taxes the taxpayers paid to other jurisdictions.[6] Because the taxpayers waived any refund claims based on such credits, the trial court awarded no tax refunds to any of them. DOR filed motions for reconsideration in both cases, which were denied. Both the taxpayers and DOR appealed. We granted direct review. RAP 4.2(a)(4). For purposes of argument, *Grace/Chrysler* and *Buffelen/Anheuser-Busch* were treated as separate cases, but we resolve the issues in those cases in this single opinion.

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[5] By 1997, only 47 of the 103 actions remained, the rest having been dismissed by stipulation or by motion of DOR. The trial court later granted motions to bring three more pending actions, with a total of five plaintiffs, under the *Buffelen* caption.

[6] The trial court severed three plaintiffs, Anheuser-Busch, Inc., Apple Computer, Inc., and Herman Miller, Inc., allegedly with "place of sale claims," and consolidated their refund claims under the caption of *Anheuser-Busch, Inc. v. State*, No. 86-2-02675-1 (Thurston Co. Super. Ct. July 18, 1997). The court then entered summary judgments in *Anheuser-Busch* as well.

ANALYSIS

As a preliminary matter, DOR has raised a number of procedural issues including standing, issue/claim preclusion, the propriety of the consolidation of cases in *Buffelen*, the designation of evidence relied upon in the summary judgment orders under CR 56(h)/RAP 9.12, and the admissibility of the affidavit of John Piper, one of the taxpayers' attorneys.

In light of the sheer volume of cases confronting the trial court, we give significant latitude to its efforts to process the many cases before it. First, CR 42(a) confers substantial discretion on trial courts with respect to consolidation of common questions of law or fact. DOR has failed to demonstrate the trial court abused its discretion in consolidating the tax refund actions under the *Buffelen/Anheuser-Busch* captions. *Leader Nat'l Ins. Co. v. Torres*, 51 Wn.App. 136, 142, 751 P.2d 1252 (1988) ("CR 42(a) allows a court to consolidate actions which involve a common question of law or fact. Consolidation is within the discretion of the trial court and will be reversed only upon a showing of abuse and that the moving party was prejudiced."), *aff'd*, 113 Wn.2d 366, 779 P.2d 722 (1989). We affirm the trial court's consolidation order in *Buffelen* as DOR demonstrates no abuse of discretion by the trial court. *State v. Norby*, 122 Wn.2d 258, 265, 858 P.2d 210 (1993) (trial court's ruling consolidating cases is reviewed under the abuse of discretion standard); *Port of Seattle v. Equitable Capital Group, Inc.*, 127 Wn.2d 202, 213, 898 P.2d 275 (1995) (discretionary decision or order of the trial court will not be disturbed on review except on a clear showing of abuse, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons).

Second, with respect to the listing of evidence, DOR faults the summary judgment orders entered by the trial court in *Buffelen* and *Anheuser-Busch* because they do not include seven affidavits presented by DOR in the listing

of evidence the trial court considered. However, because the trial court indicated it had indeed read six of the seven affidavits, and the affidavits are included in the record before us, DOR's assertion that CR 56(h) and RAP 9.12 require the listing of such evidence in the judgment is of no moment. Because the affidavits are included in the record on appeal, any error in failing to list the affidavits in the summary judgment order is harmless. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984) (an error, not of constitutional magnitude, is harmless if there is a reasonable probability that absent the error the result would have been the same).

Third, as to the Piper affidavit, the admissibility of evidence is within the discretion of the trial court. *See State v. Brown*, 132 Wn.2d 529, 571-72, 940 P.2d 546 (1997) (trial court's admission of evidence is reviewed for abuse of discretion), *cert. denied*, 118 S. Ct. 1192 (1998). DOR asserts the trial court erred in refusing to strike the affidavits of John T. Piper, arguing the information contained therein is irrelevant and inadmissible. It further asserts nearly half the materials attached to the Piper affidavit are exact copies of evidence the taxpayers presented in *American Nat'l Can*; and, because the affidavits were offered to support taxpayers' renewed discrimination challenge to the MATC, from which taxpayers are precluded from relitigating, the affidavits should have been stricken. As the trial court essentially found in DOR's favor on the issues the affidavit concerned (i.e., taxpayers' constitutional challenges to the MATC), we do not reach this issue. *State v. Gentry*, 125 Wn.2d 570, 616-17, 888 P.2d 1105, *cert. denied*, 516 U.S. 843, 116 S. Ct. 131, 133 L. Ed. 2d 79 (1995) (purely academic discussions of moot issues are inappropriate).

Finally, the standing and issue/claim preclusion issues DOR raises are plainly the most significant and meritorious of its many procedural arguments. Grace and Chrysler were parties in both *National Can I/Tyler Pipe*

and *American Nat'l Can*. The former case rejected taxpayers' apportionment argument and the latter case both noted the resolution of the apportionment claim in *Tyler Pipe* and rejected taxpayers' constitutional challenges to Washington's amended B&O tax scheme. *See Tyler Pipe*, 483 U.S. at 240, 248-53; *American Nat'l Can*, 114 Wn.2d at 248-49.[7] Thus, with respect to many of the issues raised by the taxpayers, they may well have had their day in court on those issues, although the taxpayers assert that the United States Supreme Court jurisprudence on taxation and the Commerce Clause requires these issues to be re-examined.

DOR also contends a number of the plaintiff taxpayers in the *Buffelen* litigation failed to prove their standing to make the Commerce Clause challenges in those actions. We note, however, the trial court did not reach the standing issue because the substantive grounds upon which it ruled were dispositive of the case. Issues upon which the trial court has made no final determination are not ripe for review. *Department of Ecology v. Acquavella*, 131 Wn.2d 746, 759-60, 935 P.2d 595 (1997) (where the trial court made no finding whether an irrigation district had forfeited a portion of its water rights, that issue was not ripe for review).

To lay to rest, once and for all, any lingering uncertainty regarding the application of *Tyler Pipe* and the 1987 remedial legislation, we prefer to resolve the substantive issues of the constitutional defect in Washington's B&O tax system and remedies for such defect. We take this unusual step because of the unique circumstances of this case and the public importance of the issues here, and do not intend this exceptional approach to become the rule on review. *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d

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[7] Indeed, taxpayers in *American Nat'l Can* conceded Washington's B&O tax is fairly apportioned. *American Nat'l Can*, 114 Wn.2d at 248.

148, 165-66, 795 P.2d 1143 (1990) (a reviewing court is not obliged to decide all the issues raised by the parties, but only those which are determinative). With respect to any issues of issue/claim preclusion and standing affecting individual parties, DOR's right to raise them to the trial court, if necessary, is fully preserved.[8]

A. Tyler Pipe Applies Retroactively

DOR argues *Tyler Pipe's* invalidation on commerce clause grounds of former RCW 82.04.440, exempting in-state manufacturers of goods sold in this state but not other manufacturers, does not apply retroactively to tax periods prior to June 23, 1987. We have already ruled on this issue, however, in *Digital*, holding the *Tyler Pipe* decision to apply retroactively.

Although we issued three opinions in *Digital*, we held *Tyler Pipe* applies retroactively. As we recently held in *Davidson v. Hensen*, 135 Wn.2d 112, 128, 954 P.2d 1327

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[8] Likewise, given our disposition of this case we deem it unnecessary at this time to address the preclusion issue decided by the trial court in *Grace/Chrysler*. Our review of this issue is specifically reserved however, should further review be required. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277, 104 S. Ct. 3049, 3058, 82 L. Ed. 2d 200 (1984) (noting remand to state courts for further proceedings is appropriate where "the federal constitutional issues involved may well be intertwined with, or their consideration obviated by, issues of state law"); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 347, 116 S. Ct. 848, 862, 133 L. Ed. 2d 796 (1996) (citing *Bacchus*, remanding for determination of whether taxpayer complied with state law procedural requirements); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544, 111 S. Ct. 2439, 2448, 115 L. Ed. 2d 481 (1991) (remanding for further proceedings, citing *Bacchus*, holding that the Court's ruling, requiring a rule of law be applied equally to all litigants who are not barred by procedural requirements or res judicata, did not deprive respondents of their opportunity to raise procedural bars to recovery under state law).

(1998), "[w]here there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds." While expressing different reasoning for their conclusions, five members of this Court, in the lead and concurring opinions, indicated *Tyler Pipe* applies retroactively. *Digital Equip. Corp. v. Department of Revenue*, 129 Wn.2d 177, 188 ("To the extent our decision in *National Can* II holds that *Tyler Pipe* applies only on a prospective basis, we overrule it." (Smith, J., majority op.); "*Tyler Pipe* must be applied retroactively to tax periods predating its pronouncement[.]" *Id.* at 194. *See also id.* at 195, Durham, C.J., concurring opinion, agreeing with the majority's decision to overrule *National Can* II's determination *Tyler Pipe* would apply only prospectively, and clearly concluding "I would hold that . . . *Tyler Pipe* applies retroactively. . . . " *Id.* at 205.) The five-member decision in *Digital* is controlling on the issue of retroactivity. On principles of stare decisis, we affirm the trial court's decision on this issue.[9]

B. Remedy for Washington's Constitutionally Defective B&O Tax

The taxpayers assert Washington's B&O tax is a nullity and they do not have to pay any B&O taxes whatsoever. They renew certain commerce clause challenges to application of the 1987 MATC credit, alleging the credit discriminates against interstate commerce and fails to properly apportion the B&O tax to interstate and intrastate activities of taxpayers. They also assert the MATC

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[9] *See State v. Gentry*, 125 Wn.2d 570, 587 n.12, 888 P.2d 1105 (writing justice whose dissenting views in prior case were not accepted by majority of the court was bound by doctrine of stare decisis to accede to the view of the majority on that issue in subsequent case), *cert. denied*, 516 U.S. 843, 116 S. Ct. 131, 133 L. Ed. 2d 79 (1995).

credit offends due process as both a "bait and switch" tactic forbidden by the United States Constitution, and by reaching too far back in time.

1. Washington's B&O Tax Scheme is Not a Nullity

The taxpayers argue the United States Supreme Court's decision in *Tyler Pipe* rendered that tax a nullity, totally void from its inception, and incapable of being cured by any legislative amendment. Therefore, they argue, they do not have to pay any B&O taxes whatsoever. They rely on antiquated Supreme Court authority, *Norton v. Shelby County*, 118 U.S. 425, 6 S. Ct. 1121, 1125, 30 L. Ed. 178 (1886),[10] and our statement in *Boeing Co. v. State*, 74 Wn.2d 82, 88-89, 442 P.2d 970 (1968) of the general rule that an invalid statute is a nullity. However, controlling law on this issue is found in a more recent United States Supreme Court precedent, which we have specifically adopted.

In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990), the United States Supreme Court recognized where a State imposes an unconstitutional tax that is not beyond the power of the legislature to impose or does not fall on persons immune from taxation, the state legislature may modify the offending statute retroactively to correct the constitutional defect. In *McKesson*, the Court struck down a Florida liquor tax statute which favored in-state products. However, the Court did not treat the statute as a nullity:

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[10] The "void ab initio" doctrine upon which taxpayers rely, as expressed in Norton, has been abandoned by the Supreme Court. *See Lemon v. Kurtzman*, 411 U.S. 192, 197-99, 93 S. Ct. 1463, 1468-69, 36 L. Ed. 2d 151 (1973) (recognizing the abandonment of *Norton*); *Ryan v. County of DuPage*, 45 F.3d 1090, 1094 (7th Cir. 1995) (same).

> a State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination. Florida may reformulate and enforce the Liquor Tax during the contested tax period in any way that treats petitioner and its competitors in a manner consistent with the dictates of the Commerce Clause. Having done so, the State may retain the tax appropriately levied upon petitioner pursuant to this reformulated scheme because this retention would deprive petitioner of its property pursuant to a tax scheme that is *valid* under the Commerce Clause.

McKesson, 496 U.S. at 39-40. Similarly, in *Associated Indus. v. Lohman*, 511 U.S. 641, 114 S. Ct. 1815, 128 L. Ed. 2d 639 (1994), the Court stated:

> That we have declared the tax scheme impermissibly discriminatory in some localities does not in itself dictate the relief that the State must provide. As we noted in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18, 39-40[, 110 S. Ct. 2238, 2252, 110 L. Ed. 2d 17] (1990), a "State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination." . . . [T]he Due Process Clause would demand only that, "to cure the illegality of the tax as originally imposed, the State must ultimately collect a tax for the contested tax period that in no respect impermissibly discriminates against interstate commerce." *Id.*, at 44, n.27[, 110 S. Ct. at 2254 n.27]. The methods best adapted to achieving equal treatment in this case, whether partial or complete refunds or other measures, are similarly matters properly left for determination on remand.

Lohman, 511 U.S. at 656. *See also Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 755, 115 S. Ct. 1745, 1750, 131 L. Ed. 2d 820 (1995) (citing *McKesson*, noting the "special circumstances" of tax cases involving a particular kind of constitutional violation, a discriminatory tax, which the State may cure without repaying back taxes).

In *American Nat'l Can* we acknowledged the dual purpose of the 1987 curative legislation to both establish parity among taxpayers and preserve the integrity of the B&O tax system, finding the new tax law constitutional. *American Nat'l Can*, at 247-49. We specifically adopted the *McKesson* analysis in *Digital*, at 189-91, holding the 1987 legislation cured any constitutional defect in Washington's B&O tax. We adhere again to those rulings: Washington's B&O tax is not a nullity because of the defects identified in *Tyler Pipe* where the 1987 remedial legislation cures such constitutional defects.

2. Taxpayers Commerce Clause Arguments Are Meritless

Taxpayers assert Washington's B&O tax, including the curative 1987 MATC, and that provision's reporting requirements, discriminates against interstate commerce. They also claim "[a]pportionment is the only permanent cure for the discrimination manifest in Washington's B&O Tax." G. Appellants' Br. at 41, B. Appellants' Br. at 31.

We put to rest taxpayers' discrimination and other constitutional challenges in *American Nat'l Can*, holding the 1987 MATC does not discriminate against interstate commerce, nor does it offend the requirements of equal protection or due process in curing any constitutional defects in Washington's B&O tax. *Id.* at 248-53. We also acknowledged the apportionment issue has been settled.

> A long line of precedent has held that Washington's B&O tax meets the fair apportionment test. [Citations omitted.] This court ruled that the B&O tax without the 2-way credit posed no

> apportionment problem in *National Can Corp. v. Department of Rev.*, 105 Wn.2d 327, 340-42, 732 P.2d 134 (1986). The Supreme Court did not disagree. Indeed, it rejected Tyler's fair apportionment challenge to the wholesale tax. *Tyler*, 483 U.S. at 253.

American Nat'l Can, 114 Wn.2d at 248. *See also Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 100-02, 113 S. Ct. 2510, 2519-20, 125 L. Ed. 2d 74 (1993) (state may craft a remedy in response to determination that it has imposed a tax that discriminates against interstate commerce).

Taxpayers ask us to ignore our own and the United States Supreme Court's rulings and revisit the apportionment issue. Relying on a law review article criticizing the Supreme Court's approach in several cases,[11] including *Tyler Pipe*, as inconsistent with *Oklahoma State Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995), the taxpayers urge us to seize this opportunity to apply *Jefferson Lines* and correct what they see as a misconceived analogy between the retail sales tax and gross receipts taxes.

We believe the taxpayers reliance on *Jefferson Lines* is misplaced. Nothing in that case purports to overturn or limit *Tyler Pipe*, including *Tyler Pipe*'s rejection of an apportionment challenge to Washington's B&O tax. Noting that *Tyler Pipe* struck down Washington's gross receipts wholesaling tax exempting in-state, but not out-of-state, manufacturers, the United States Supreme Court went on to explain:

> Although we have not held that a State imposing an apportioned gross receipts tax that grants a credit for sales taxes paid in-state must also extend such a credit to sales taxes paid out-

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[11] Walter Hellerstein et al., *Commerce Clause Restraints on State Taxation After* Jefferson Lines, 51 Tax L. Rev. 47 (1995).

> of-state, we have noted that equality of treatment of interstate and intrastate activity has been the common theme among the paired (or "compensating") tax schemes that have passed constitutional muster. We have indeed never upheld a tax in the face of a substantiated charge that it provided credits for the taxpayer's payment of in-state taxes but failed to extend such credit to payment of equivalent out-of-state taxes. To the contrary, in upholding tax schemes providing credits for taxes paid in-state and occasioned by the same transaction, we have often pointed to the concomitant credit provisions for taxes paid out of state as supporting our conclusion that a particular tax passed muster because it treated out-of-state and in-state taxpayers alike. A general requirement of equal treatment is thus amply clear from our precedent. We express no opinion on the need for equal treatment when a credit is allowed for payment of in- or out-of-state taxes by a third party.

Jefferson Lines, 514 U.S. at 192 n.6 (citations omitted). The taxpayers' premise that *Jefferson Lines* implicitly struck down or limited *Tyler Pipe* is inaccurate. *Jefferson Lines* also approves a credit for taxes paid out-of-state as provided by the MATC. We believe the guidelines enunciated by the United States Supreme Court in *McKesson* remain the applicable law here. We adhere again to our rulings in *American Nat'l Can* and *Digital* which comport with *McKesson*. The 1987 MATC cures the unconstitutional impact of Washington's B&O tax on interstate commerce identified by the United States Supreme Court in *Tyler Pipe*.

3. Application of the 1987 MATC Does Not Offend Due Process

The taxpayers also assert because the B&O tax was found unconstitutional in *Tyler Pipe*, anything less than either the enjoining of the collection of taxes pursuant to RCW 82.32.150, or the full refund of taxes paid, amounts to a "bait and switch" which offends due process principles. They contend that the exclusive remedy feature of the 1987 remedial legislation deprives them of the statutory opportunity to enjoin collection of the unconstitutional tax, or have such taxes refunded. But the authority they cite, *Newsweek, Inc. v. Florida Dep't of Revenue*, ___ U.S. ___, 118 S. Ct. 904, 139 L. Ed. 2d 888 (1998) does not appear to advance their position.

Newsweek (citing *Reich v. Collins*, 513 U.S. 106, 115 S. Ct. 547, 130 L. Ed. 2d 454 (1994)), holds that where Florida law provided a taxpayer with a choice of either prepayment or postpayment challenges to an assessed tax, it violated due process to deprive a taxpayer of the postpayment challenge option where he had paid the assessed taxes while reasonably relying on the availability of such option. The taxpayers here have not been deprived of the opportunity to challenge the Washington B&O tax scheme, as the taxpayers' many appearances before us challenging Washington's B&O tax attest. *See also McKesson*, 110 S. Ct. at 2252 ("In the end, the State's postdeprivation procedure would provide petitioner with all of the process it is due: an opportunity to contest the validity of the tax and a 'clear and certain remedy' designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property."). The taxpayers have a right to challenge the imposition of an unconstitutional tax and such a right is preserved both in prepayment or postpayment settings. As we previously determined, credits provided in the

1987 remedial statute are the appropriate remedy in this instance.[12]

We have specifically rejected taxpayers' argument that "the 1987 credit law, as an exclusive remedy, does not meet the requirements of federal due process." *Digital*, 129 Wn.2d at 189, 190. Moreover, it is difficult to envision that the taxpayers "bait and switch" argument carries any strength when *the United States Supreme Court specifically approved the credit remedy set forth in the 1987 remedial legislation. Tyler Pipe*, 483 U.S. at 249. *See also McKesson*, 496 U.S. at 39-40. *Harper*, 509 U.S. at 100-01 (noting federal law does not necessarily mandate refund of a tax found to be impermissibly discriminatory, and that states retain flexibility to craft a remedy which satisfies federal due process).

We next turn to the question of the retroactive application of the 1987 remedial legislation. The trial court here held the 1987 curative legislation applied retroactively and cured any defects in the Washington B&O tax. The taxpayers argue retroactive application of the 1987 curative legislation offends due process because it reaches back too far in time, citing *Welch v. Henry*, 305 U.S. 134, 59 S. Ct. 121, 83 L.Ed. 2d 87 (1938) (approving a two year retroactive application of a tax statute); *State v.*

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[12] At oral argument, taxpayers asserted that *Reich, Newsweek* and *Dryden v. Madison County*, ___ U.S. ___, 118 S. Ct. 1162, 140 L. Ed. 2d 173 (1998), an opinion which vacated a Florida Supreme Court decision and remanded in light of *Newsweek*, are dispositive of this case, suggesting the Supreme Court has retreated from the approach it announced in *McKesson*. However, none of these cases addresses a credit provision analogous to this case. Furthermore, these cases, read together with *Lohman* and *Reynoldsville Casket*, do not indicate the Supreme Court has either abandoned the "flexibility" it enunciated in *McKesson*, nor reversed itself regarding the credits it stated in *Tyler Pipe* would cure the defect in Washington's B&O tax.

Pacific Tel. & Tel. Co., 9 Wn.2d 11, 17, 113 P.2d 542, 545 (1941) (striking a four year period of tax statute retroactivity); and *United States v. Carlton*, 512 U.S. 26, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994) (approving a slightly greater than one year retroactive application of a tax statute).

We have already decided this issue as well. In *American Nat'l Can*, we applied the 1987 legislation retroactively to the so-called interim period of June 23, 1987, the date of the *Tyler Pipe* decision, to August 11, 1987, the effective date of the 1987 legislation. *American Nat'l Can*, 114 Wn.2d at 253. In *Digital*, we went an additional step and rejected a due process challenge to the 1987 curative legislation, denying Digital's request for a refund of B&O taxes paid between January 1, 1983, and August 11, 1987, in effect applying the 1987 legislation retroactively for a period of some four and a half years. We stated:

> Retroactive application of the 1987 credit law, designed to cure the constitutional infirmities of the B&O tax exemption scheme, satisfies the requirements of federal due process as a postdeprivation remedy. By providing manufacturers with tax credits for unconstitutional taxes paid, a clear and certain remedy is provided which cures the unconstitutional deprivation by equalizing the tax disparity between those manufacturers and manufacturers who were not subjected to the unconstitutional B&O taxes.

Digital, 129 Wn.2d at 194-95.[13] Our *Digital* decision on retroactivity is consistent with the legislative intent

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[13] With the exception of *Newsweek* and *Dryden*, our determination in *Digital* postdates the authority relied upon by taxpayers. In *Digital*, as in our other post-*Tyler Pipe* cases, we continue to rely and build upon the pronouncements of the Supreme Court in *Tyler Pipe* (*see* n.12 above). Absent a clear directive from that Court to do otherwise, we will continue to rely on the roadmap provided to us in *Tyler Pipe*. Thus, *Digital* is dispositive of taxpayers' due process challenge.

expressed in § 3 of the 1987 act to apply the MATC retroactively, if necessary, to cure any problems with Washington's B&O tax. Laws of 1987, 2d Ex. Sess., ch. 3, § 3.

Our holding in *Digital* finds support in federal case law. In *Welch*, the United States Supreme Court upheld retroactive application of a 1935 Wisconsin income tax on dividends received in 1933, relying on well established precedent holding "a tax is not necessarily unconstitutional because retroactive [,]" 305 U.S. at 146, and noting similar contexts in which due process challenges to tax statutes had been rejected. 305 U.S. at 149.

In *Temple University v. United States*, 769 F.2d 126 (3d Cir. 1985), *cert. denied*, 476 U.S. 1182, 106 S. Ct. 2914, 91 L. Ed. 2d 544 (1986), the Third Circuit relied on *Welch* in rejecting taxpayers due process challenge to 1984 curative legislation which cut off taxpayers claim for FICA tax refunds reaching back to 1979. The Third Circuit held (1) Congress may, without violating the due process clause, enact legislation having retroactive application if it is justified by a rational legislative purpose, (2) when such legislation is "curative" in character the retroactive application is entitled to be liberally construed, and (3) courts afford greater tolerance toward retroactive application of laws which coincide with long-standing public policy. *Id.* at 134.

In reaching its conclusion the Third Circuit discussed the implications of *Welch*, disagreeing with some state courts which applied *Welch* narrowly in declaring unconstitutional tax statutes which reached back in time more than one year prior to the statute's enactment. Noting the Supreme Court has never actually prohibited such retroactivity, the Third Circuit found compelling the flexible standard provided in *Welch*, coupled with the fact the Supreme Court had spoken only in general terms, permitting an income tax statute to be retroactively applied to "recent transactions," and no federal court of appeals had

yet adopted an absolute temporal limitation on retroactivity.

> We find some guidance in the rather flexible criteria delineated by the Court in *Welch v. Henry*: "In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." 305 U.S. at 147, 59 S. Ct. at 126. The federal courts have generally interpreted these criteria as indicating that "[r]etroactive operation is constitutional where it is not harsh, arbitrary or unfair." An amplification of this principle is provided by an earlier case:
>
> > The decisive test in this instance is whether this taxpayer has had its expectations as to taxation unreasonably disappointed. . . . [R]etroactive taxation is not so arbitrary and oppressive as to be unconstitutional if it is no more burdensome than the taxpayer should have expected it to be when he did the thing which created the tax liability. . . . And when it is not, whether the period of retroactivity is comparatively long or short is of little consequence provided it isn't too long to be within reason.

Temple, 769 F.2d at 135 (alteration in original) (citations and footnotes omitted). As in *Temple*, it cannot be said taxpayers here have had their "expectations as to taxation unreasonably disappointed," or retroactive application of the 1987 curative credit, designed to benefit taxpayers, has made their tax liability more burdensome.

In *Carlton*, the Supreme Court again emphasized retroactive tax legislation has been repeatedly upheld

against a due process challenge, 512 U.S. [at] 30, and explained the key inquiry as follows:

> Some . . . decisions have stated that the validity of a retroactive tax provision under the Due Process Clause depends upon whether "retroactive application is so harsh and oppressive as to transgress the constitutional limitation." The "harsh and oppressive" formulation, however, "does not differ from the prohibition against arbitrary and irrational legislation" that applies generally to enactments in the sphere of economic policy. The due process standard to be applied to tax statutes with retroactive effect, therefore, is the same as that generally applicable to retroactive economic legislation:
>
> > "Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches. . . .
> >
> > "To be sure, . . . retroactive legislation does have to meet a burden not faced by legislation that has only future effects. . . . 'The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former'. . . . *But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.*"

Carlton, 512 U.S. at 30-31 (citations omitted) (emphasis added). We have previously approved the motives of the legislature as proper in enacting the 1987 credit law to

establish parity among taxpayers. *American Nat'l Can*, 114 Wn.2d at 248. Thus, the rational legislative purpose which *Carlton* requires is present.

The United States Supreme Court has not set a specific duration to the retroactive effect of tax legislation, preferring to rely on legislative decisions in this context. We adhere to our prior rulings in *American Nat'l Can* and *Digital*: retroactive application of the 1987 remedial legislation is called for by the statute and does not offend constitutional principles.

CONCLUSION

The time has come for this litigation to end. More than a decade ago in *Tyler Pipe*, the United States Supreme Court found Washington's B&O tax, as it applies to interstate sales and manufacturing, to offend the Commerce Clause. The *Tyler Pipe* decision applies retroactively.

Within two months of the *Tyler Pipe* decision the Legislature responded by enacting remedial legislation. That 1987 MATC legislation addressed the constitutional defects in a fashion specifically suggested by the United States Supreme Court itself. We reject here, as we have done previously, the taxpayers' commerce clause and due process challenges to the MATC. As cured by the MATC, Washington's B&O tax on interstate sales and manufacturing is not a nullity. The taxpayers' relief is limited to MATC credits. Thus, we apply the 1987 curative legislation retroactively. Such a retroactive application comports with the statutory directive and does not offend due process principles.

We affirm the trial court judgments on these key points and remand the cases to the trial court for further action consistent with this opinion.

/s/ Talmadge, J.

WE CONCUR:

/s/ Durham, J.
/s/ Dolbin, J. P.T.
/s/ Smith, J.
/s/ Guy, C.J.
/s/ Johnson, J.
/s/ _____
/s/ Alexander, J.
/s/ _____

W.R. Grace & Co. et al. v. State
consolidated with *Buffelen Woodworking*
Majority by Talmadge, J.
Dissent by Sanders, J.

No. 64335-1

SANDERS, J. (dissenting) – While the majority asserts "[t]he time has come for this litigation to end" (Majority at 29), the time this matter *should* end is the time our state respects the constitutional rights[1] of its taxpayers and the time this court provides an adequate remedy for those whose rights have been violated. Unfortunately, that time has yet to come.

At their core the facts are relatively simple: we have an unapportioned business and occupation tax on gross receipts which, at least prior to the effective date of its

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[1] "[T]here is much more than a formal link between the federalism-based idea of shielding persons from the parochial forces of localism and the broader notion of protecting individuals against unfair and oppressive action by the state." Laurence H. Tribe, *American Constitutional Law* 402 (2d ed. 1988) (footnote omitted).

amendment on August 11, 1987, violated the interstate commerce clause. Quite understandably the government wants to keep the moneys collected from this unconstitutional tax; in fact it wants to collect even more! Less understandably this court will not put a stop to it.

The question may be divided into two parts: the appropriate remedy due interstate taxpayers for preamendment taxes alleged due but unpaid and/or actually paid; and whether the 1987 amendment effectively cured the commerce clause deficiency so as to eliminate the necessity to provide a remedy for post-1987 tax periods.

I submit proper resolution of this case depends entirely on the nature and effect of the 1987 amendatory act[2] (hereinafter "1987 act"), for existing state statutes clearly provide (1) the State may not lawfully require payment of an unconstitutional tax;[3] (2) collection of an unconstitutional tax may be enjoined;[4]

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[2] Laws of 1987, 2d Ex. Sess., ch. 3, partially codified at RCW 82.04.440.

[3] RCW 82.04.4286:

> **Deductions – Nontaxable business.** In computing tax there may be deducted from the measure of tax amounts derived from business which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States.

[4] RCW 82.32.150:

> **Contest of tax – Prepayment required – Restraining orders and injunctions barred.** All taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest. No restraining order or injunction shall be granted or issued by any court or judge to restrain or enjoin the collection of any tax or penalty or any part thereof, except upon the ground that the assessment thereof

and (3) unconstitutional taxes actually paid must be refunded.[5]

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was in violation of the Constitution of the United States or that of the state.

[5] RCW 82.32.060:

Excess payment of tax, penalty, or interest – Credit or refund – Payment of judgments for refund. (1) If, upon receipt of an application by a taxpayer for a refund or for an audit of the taxpayer's records, or upon an examination of the returns or records of any taxpayer, it is determined by the department that within the statutory period for assessment of taxes, penalties, or interest prescribed by RCW 82.32.050 any amount of tax, penalty, or interest has been paid in excess of that properly due, the excess amount paid within, or attributable to, such period shall be credited to the taxpayer's account or shall be refunded to the taxpayer, at the taxpayer's option. Except as provided in subsections (2) and (3) of this section, no refund or credit shall be made for taxes, penalties, or interest paid more than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed.

(2) The execution of a written waiver under RCW 82.32.050 or 82.32.100 shall extend the time for making a refund or credit of any taxes paid during, or attributable to, the years covered by the waiver if, prior to the expiration of the waiver period, an application for refund of such taxes is made by the taxpayer or the department discovers a refund or credit is due.

(3) Notwithstanding the foregoing limitations there shall be refunded or credited to taxpayers engaged in the performance of United States government contracts or subcontracts the amount of any tax paid, measured by that portion of the amounts received from the United States, which the taxpayer is

I fundamentally differ with my colleagues in a number of respects:

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required by contract or applicable federal statute to refund or credit to the United States, if claim for such refund is filed by the taxpayer with the department within one year of the date that the amount of the refund or credit due to the United States is finally determined and filed within four years of the date on which the tax was paid: PROVIDED, That no interest shall be allowed on such refund.

(4) Any such refunds shall be made by means of vouchers approved by the department and by the issuance of state warrants drawn upon and payable from such funds as the legislature may provide. However, taxpayers who are required to pay taxes by electronic funds transfer under RCW 82.32.080 shall have any refunds paid by electronic funds transfer.

(5) Any judgment for which a recovery is granted by any court of competent jurisdiction, not appealed from, for tax, penalties, and interest which were paid by the taxpayer, and costs, in a suit by any taxpayer shall be paid in the same manner, as provided in subsection (4) of this section, upon the filing with the department of a certified copy of the order or judgment of the court.

(a) Interest at the rate of three percent per annum shall be allowed by the department and by any court on the amount of any refund, credit, or other recovery allowed to a taxpayer for taxes, penalties, or interest paid by the taxpayer before January 1, 1992. This rate of interest shall apply for all interest allowed through December 31, 1998. Interest allowed after December 31, 1998, shall be computed at the rate as computed under RCW 82.32.050(2). The rate so computed shall be adjusted on the first day of January of each year for use in computing interest for that calendar year.

(b) For refunds or credits of amounts paid or other recovery allowed to a taxpayer after December

First, the multiple activities tax credit provision in the 1987 act does not establish any obligation to pay any portion of the unconstitutional tax against which the credit may apply. Second, the 1987 act is prospectively effective from August 11, 1987, not retroactive to the beginning of time. Notwithstanding the expressed legislative intention set forth in section 3 of the 1987 act to restrict taxpayer remedies for prior tax periods to credits only, section 3 does not retroactively amend the substance of the preexisting B & O tax. Therefore the constitutional deficiency is not retroactively cured – even if we assume a retroactive amendment could ever resurrect an unconstitutional statute.

Third, this legislative effort to deny taxpayers their clearly defined preexisting statutory remedies against payment or refund of an unconstitutional tax deprives those taxpayers their property absent that process due by not only denying them a "clear and certain remedy" for the deprivation but also employing an unconstitutional "bait and switch" tactic.

Fourth, the 1987 act's tax credit scheme unconstitutionally discriminates against interstate commerce because tax credits for interstate business are nearly impossible to prove in practice; and the imposition of such a burden of proof, which depends on the tax laws of other states, is unconstitutional in theory.

Fifth, the Washington B & O tax, a tax on gross receipts, violates the commerce clause on its face because it is not apportioned to in-state value-producing activity, but taxes out-of-state activity as well.

31, 1991, the rate of interest shall be the rate as computed for assessments under RCW 82.32.050(2). The rate so computed shall be adjusted on the first day of January of each year for use in computing interest for that calendar year.

Assuming even one of the aforementioned disagreements with the majority is well founded in fact and law, these taxpayers are entitled to the full measure of the relief they request, not a farthing less.

I.

Statutory availability of tax credits does not defeat defense to underlying tax obligation, nor establish obligation to pay an unconstitutional tax

Section 3 of the amendatory act provides:

> If it is determined by a court of competent jurisdiction, in a judgment not subject to review, that relief is appropriate for any tax reporting periods before the effective date of this act, in respect to RCW 82.04.440 as it existed before the effective date of this act, it is the intent of the legislature that the *credits provided in RCW 82.04.440* as amended by section 2 of this act shall be applied to such reporting periods and that relief for such periods be limited to the granting of such credits.

Laws of 1987, 2d Ex.Sess., ch. 3, § 3 (emphasis added).

Section 3's reference to "the credits provided in RCW 82.04.440 as amended by section 2 of this act" is a scheme of multiple activities tax credits (MATC) whereby interstate taxpayers may credit qualifying taxes paid in other jurisdictions against their Washington B & O tax obligation, *provided*: "The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the sale . . . manufacturing . . . [or] extraction . . . of those products." RCW 82.04.440(2), (3), (4). This statute implements a garden variety tax credit scheme where it is first necessary to establish and compute the tax liability before

that liability can be reduced by setting off available credits.[6]

Plainly section 3 of the 1987 act is not inconsistent on its face with the assertion by interstate taxpayers that there are no taxes lawfully due for the pre-August 11, 1987 tax periods, regardless whether these taxpayers are entitled to apply any statutory tax credits. Axiomatically if no taxes are due for any tax period in question proceedings to establish or contest the availability of a credit against a $0 tax obligation are a waste of time for all concerned.

I posit there is indeed no such tax obligation because (1) the 1987 preamendment tax was found unconstitutional in *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987); (2) *Tyler Pipe*, as concedes the majority, applies retroactively (Majority at 15);[7] (3) the 1987 act does not retroactively amend the substance of preexisting tax law; and (4) any unconstitutional statute, including a taxing statute, is invalid.

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[6] "In taxation, credits reduce the tax liability as computed, as opposed to deductions which reduce the taxable income. Examples of tax credits include: credit for child and dependent care expenses, credit for the elderly or permanently disabled, etc." *Black's Law Dictionary* 367 (6th ed. 1990).

[7] *See also Digital Equip. Corp. v. Department of Revenue*, 129 Wn.2d 177, 188, 916 P.2d 933 (1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 2452, 138 L. Ed. 2d 210 (1997). Moreover I concur specifically with the majority's view that *Tyler Pipe* applies retroactively as "prospective decisionmaking is the handmaid of judicial activism, and the born enemy of *stare decisis*," *Harper v. Department of Taxation*, 509 U.S. 86, 105, 113 S. Ct. 2510, 2522, 125 L. Ed. 2d 74 (1993) (Scalia, J., concurring), as "[constitutional] *meaning* is changeless; it is only [its] *application* which is extensible." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 451, 54 S. Ct. 231, 78 L. Ed. 413, 88 A.L.R. 1481 (1934) (Sutherland, J., dissenting).

The first two points are self-evident and/or conceded by the majority. The third point will be discussed in the next section. I would have assumed the fourth point is also self-evident but for the fact the majority has engaged in such a complex analysis to reach a result favorable to the state tax collector. Therefore let us repair to those fundamentals of statutory invalidity to test the majority's conclusion that one may be compelled to pay an unconstitutional tax.

It was no less than Chief Justice John Marshall who observed, "[A]n act of the legislature, repugnant to the constitution, is void." *Marbury v. Madison*, 5 U.S. 137, 176, 1 Cranch 137, 2 L. Ed. 60 (1803). Were it necessary to find further justification for the Chief Justice, Alexander Hamilton provided exactly that in Federalist No. 78 wherein he opined, prior to the ratification of our national character:

> No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorise, but what they forbid.

The Federalist No. 78 (Alexander Hamilton) (May 28, 1788), *reprinted in The Federalist Papers by Alexander Hamilton, James Madison, and John Jay* 395-96 (Garry Wills ed., 1982).

Later judicial generations have also pledged their fidelity to this principle. In *Norton v. Shelby County*, 118 U.S. 425, 6 S. Ct. 1121, 30 L. Ed. 178 (1886), for example, the United States Supreme Court repeated

> An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal

> contemplation, as inoperative as though it had never been passed.

Id. at 442. And our court is in accord. *See, e.g., Drum v. University Place Water Dist.*, 144 Wash. 585, 258 P. 505 (1927), *aff'd*, 147 Wash. 699, 266 P. 1056 (1928); *Boeing Co. v. State*, 74 Wn.2d 82, 88, 442 P.2d 970 (1968) ("It is the rule [under Washington law] that an invalid statute is a nullity. It is as inoperative as if it had never been passed."); *City of Seattle v. Grundy*, 86 Wn.2d 49, 50, 541 P.2d 994 (1975) ("A statute or ordinance which is void as being in conflict with a prohibition contained in the constitution is of no force and effect."). *See also* 16A Am. Jur. 2d *Constitutional Law* § 203 (1998) ("[A]n unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed and never existed.") (footnotes omitted).

Notwithstanding this weighty authority in support of what lesser minds might conclude to be a simple truth, the majority responds that "controlling law on this issue is found in a more recent United States Supreme Court precedent." Majority at 17 (citing *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990), as well as *Associated Indus. v. Lohman*, 511 U.S. 641, 114 S. Ct. 1815, 128 L. Ed. 2d 639 (1994), and *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 755, 115 S. Ct. 1745, 1750, 131 L. Ed. 2d 820 (1995)). However on closer inspection of this "more recent" authority it is apparent the United States Supreme Court has not turned its back on the Fathers but merely recognizes, under constitutionally limited circumstances, (1) a legislature may retroactively amend an otherwise unconstitutional statute so as to restore its validity during the effective period of the retroactive amendment; or (2) a decision declaring a new rule of law need not be retroactively applied.[8]

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[8] The majority's concern is properly evaluated under the Supreme Court's retroactivity analysis – a concern which is

This then leads us to the next inquiry, i.e., does the 1987 act in fact *retroactively* amend preexisting law? For if it does not, we need not consider any possible constitutional objection to a retroactive scenario not presented. I venture this inquiry is summarily answered in the negative by the statute's text.

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satisfied when the case is held, as it was here, to have retroactive effect. But the majority goes further, appearing to conclude that the principle that an unconstitutional law is void has been, sub silentio, overturned by the Supreme Court in *Lemon v. Kurtzman*, 411 U.S. 192, 197-99, 93 S. Ct. 1463, 1468-69, 36 L. Ed. 2d 151 (1973). Majority at 17 n.10. But *Lemon* stands for something quite different. As the Supreme Court explained, courts must recognize that statutes and judge-made rules of law are facts upon which people rely when making decisions. *Lemon*, 411 U.S. at 198-99. Therefore a judicial holding that a statute is unconstitutional is subject to " 'no set "principle of absolute retroactive invalidity". . . . ' " *Id.* (quoting *Linkletter v. Walker*, 381 U.S. 618, 627, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965)). Rather, the court must reconcile the constitutional interests and reliance interests *when determining whether the rule of the case shall be retroactively applied* to fashion an appropriate equitable remedy. *Lemon*, 411 U.S. at 198-99. We completed this process when we finally determined in 1996 that the Supreme Court's decision in *Tyler Pipe* nullifying our previous B & O tax would be applied retroactively. *Digital Equip. Corp.*, 129 Wn.2d at 188 (Smith, J., majority opinion); *id.* at 195 (Durham, C.J., concurring). As we have already determined that the Supreme Court's decision in *Tyler Pipe* applies retroactively, *Lemon*'s concerns have been satisfied and do not support the majority's conclusion that one deprived of his constitutional rights may also be robbed not only of his remedy but also his defense to future deprivations.

II.

Section 3 of 1987 amendment is a prospective attempt to limit preexisting remedies and does not retroactively cure the constitutional text

The majority, as well as previous decisions from this court, unfortunately use the term "retroactive" in relation to the 1987 act rather loosely by failing to distinguish between retroactive amendments to the substance of the tax vis-à-vis backward looking limitations on available remedies for prior tax periods.[9] On its face the 1987 act states its effective date shall be August 11, 1987.[10] Were the statute retroactive it would necessarily identify some prior effective date.[11] However here the legislature not

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[9] "We have already decided this issue [retroactive application of tax credit amendments] as well." Majority at 25. "Section 3 of the [1987 act] shows that the Legislature intended to apply *relief* retroactively in the event of a court-ordered remedy notwithstanding the effective date of the act." *American Nat'l Can Corp. v. Department of Revenue*, 114 Wn.2d 236, 250, 787 P.2d 545 (1990) (emphasis added). "[S]ection 3 of the 1987 session laws applies the law to tax periods prior to June 23, 1987." *Digital Equip. Corp.*, 129 Wn.2d at 193.

[10] Sec. 5. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the Senate August 10, 1987.

Passed the House August 10, 1987.

Approved by the Governor August 11, 1987.

Filed in Office of Secretary of State August 11, 1987.

Laws of 1987, 2d Ex. Sess., ch. 3, § 5.

[11] Where the legislature has *clearly* stated that the statute in question is to be applied retroactively, courts will so enforce it. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 268, 114 S. Ct. 1483, 1498, 128 L. Ed. 2d 229 (1994); *State v. Douty*, 92 Wn.2d 930, 935,

only failed to do that, but affirmatively did exactly the opposite. Had the statute not identified its effective date as August 11, 1987 a judicial question might have been presented as to its effective date by default; however, even in that event the statute would have been judicially

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603 P.2d 373 (1979). The United States Supreme Court has, for example, upheld the retroactive effective date of tax legislation where the legislative command has been explicit. *See, e.g., United States v. Carlton*, 512 U.S. 26, 38-39, 114 S. Ct. 2018, 2026, 129 L. Ed. 2d 22 (1994); *United States v. Darusmont*, 449 U.S. 292, 294-95, 101 S. Ct. 549, 551, 66 L. Ed. 2d 513 (1981) (per curiam); *Welch v. Henry*, 305 U.S. 134, 141-42, 151, 59 S. Ct. 121, 123, 83 L. Ed. 87, 118 A.L.R. 1142 (1938). Typically retroactive statutes expressly identify the prior effective date. For example, the statute at issue in *Carlton* stated that the amendments "shall take effect as if included in the amendments made by section 1172 of the Tax Reform Act of 1986." Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10411(b), 101 Stat. 1330-433. The statute under consideration in *Darusmont* read "the amendments made by this section shall apply to items of tax preference for taxable years beginning after December 31, 1975." Tax Reform Act of 1976, Pub. L. No. 94-455, § 301(g)(1), 90 Stat. 1553. In *Welch* the state statute at issue read, " 'Dividends' shall mean all dividends derived from stocks . . . received in the calendar year 1933 . . . . " 1935 Wis. Laws ch. 15, § 6(1)(b).

Our legislature showed its understanding of this rule when it last amended the B & O tax. "Except as otherwise provided in section 6 of this act, section 4 of this act *applies retrospectively* to all tax reporting periods on or after June 23, 1987." Laws of 1994, ch. 124, § 7 (emphasis added). Section 6 of the Laws of 1994, chapter 124, is, in fact, the very language we are considering. Laws of 1994, ch. 124, § 6. Section 4 is the substantive change to the B & O tax. Laws of 1994, ch. 124, § 4. That is, in 1994, the Legislature *explicitly* made the 1987 amendments to the B & O tax retroactive to June 23, 1987, the date on which the Supreme Court invalidated Washington's previous B & O tax, *and no earlier*.

deemed prospective in accordance with overwhelming authority.[12]

This conclusion does not change by virtue of section 3 of the 1987 act, which in essence purports to limit judicial remedies to tax credits for prior tax periods; for this section is not on its face an expression of retroactivity

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[12] Absent an explicit command otherwise, a court will apply a statute prospectively only. *Landgraf*, 511 U.S. at 270 ("Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent.") (citations omitted); *State v. Douty*, 92 Wn.2d 930, 935, 603 P.2d 373 (1979) ("It is a general rule . . . that a statute will be construed as prospective unless its language requires a contrary construction.").

This rule reflects the fact that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265. While retroactive legislation is not unconstitutional per se, the presumption that it is finds manifestation in several federal constitutional provisions, such as the Ex Post Facto Clause, Const. art. I, § 9, cl. 3, and art. I, § 10, cl. 1, and the prohibition on laws impairing contracts, art. I, § 10, cl. 1. *See Landgraf*, 511 U.S. at 266. The antipathy to retroactive legislation is further reflected in the Fifth Amendment's prohibition on takings and the prohibitions on Bills of Attainder found in art. I, §§ 9-10. *See Landgraf*, 511 U.S. at 266. *See also* 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1398, at 272 (5th ed. 1891) (While except for ex post facto laws and laws impairing obligation of contracts retroactive statutes may still be passed by the states, they are nonetheless "generally unjust[ ] and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.") (citation omitted); 1 James Kent, *Commentaries on American Law*, 454 (5th ed. 1844) (Retroactive laws are against every sound principle and the doctrine prohibiting them is based not only on English law but on "principles of general jurisprudence.") (citations omitted).

but rather a prospective attempt to limit future remedies for prior events. Such does not make the statute "retroactive." *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 273, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive."). Therefore we must, at the outset, distinguish all claims of the majority which are premised upon retroactive tax statutes,[13] as this one isn't. Indeed it seems nearly the entire majority opinion builds upon this false premise.[14]

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[13] In this regard the majority cites *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990) for the proposition that "the United States Supreme Court recognized where a State imposes an unconstitutional tax . . . the state legislature may modify the offending statute retroactively to correct the constitutional defect." Majority at 17. Although the Supreme Court recognized the possibility in *McKesson* ("Florida may reformulate and enforce the Liquor Tax during the contested tax period. . . ." 496 U.S. at 40), there was no retroactive legislation for the court to consider in *McKesson*. Neither is there any case analogous to our own, evidencing a legislative or judicial attempt to limit the *remedy* for prior tax periods, which has found favor in Supreme Court jurisprudence. *See* section III, *infra*. Moreover, the Supreme Court cautioned that even truly retroactive impositions of tax liability "beyond some temporal point" may offend due process. *McKesson*, 496 U.S. at 40 n.23.

[14] The majority's entire analysis on the application of the 1987 MATC, Majority at 22-28, is predicated on the presumption that the 1987 act has been given retroactive effect at all times prior to its passage.

III.

Section 3 of the amendatory act is an unconstitutional "bait and switch" tactic which offends due process

Interstate taxpayers subject to B & O taxation before the effective date of the 1987 act, August 11, 1987, also challenge the constitutionality of section 3's legislative attempt to restrict the availability of their preexisting statutory right to either defend against collection of unconstitutional taxes or obtain a full cash refund of such taxes if already paid. Section 3 of the 1987 act is uncodified. It speaks to legislative "intent" yet does not purport to amend much less repeal preexisting statutes of general application which then, and now, provide clear and certain relief from unconstitutional taxation. *See* notes two, three, and four, *supra*.

These taxpayers object to any effort to limit their remedy to tax credits, asserting such limitation not only deprives the taxpayer of that "clear and certain remedy" which the constitution requires for coerced payment of unconstitutional taxes, *McKesson*, 496 U.S. at 32, but also engages in unconstitutional "bait and switch" tactics depriving the taxpayer of a clearly established preexisting state remedy.

The essential constitutional flaw that lies at the heart of any attempt to retrospectively limit a taxpayer's remedy (to tax credits, for example) has been succinctly set out by the Supreme Court:

> In a long line of cases, this Court has established that due process requires a "clear and certain" remedy for taxes collected in violation of federal law. A State has the flexibility to provide that remedy before the disputed taxes are paid (predeprivation), after they are paid (postdeprivation), or both. But what it may not do . . . is hold out what plainly appears to be a

> "clear and certain" postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists.

Reich v. Collins, 513 U.S. 106, 108, 115 S. Ct. 547, 130 L. Ed. 2d 454 (1994) (citations omitted). Although we held limitation of the postdeprivation remedy to tax credits satisfies due process in *Digital Equipment (Digital Equip. Corp. v. Department of Revenue*, 129 Wn.2d 177, *cert. Denied*, ___ U.S. ___, 117 S. Ct. 2452, 138 L. Ed. 2d 210 (1997)) and *Digital Equipment* postdated *Reich*, *Digital Equipment* did not consider the "bait and switch" objection outlined in *Reich*, *nor even cite Reich* to signal awareness of the contrary precedent.

Notwithstanding this contrary Supreme Court mandate the majority now blesses not only that which the Supreme Court has expressly condemned but what our court has condemned as well. In *National Can Corp. v. Department of Revenue*, 109 Wn.2d 878, 749 P.2d 1286 (1989) (*National Can II*) we held: "If the taxes were collected in violation of the constitution, then the state refund statutes would mandate refunds," refusing the refund only on the mistaken assumption *Tyler Pipe* was not to be applied retroactively. *National Can II*, 109 Wn.2d at 880-881. Yet now the majority acknowledges *Tyler Pipe* applies retroactively (as we also held in *Digital Equip.*, 129 Wn.2d at 188) yet ignores, without overruling, our previous holding that retroactive application of *Tyler Pipe* "mandate[s] refunds." *National Can II*, 109 Wn.2d at 881. Consistency, therefore, is found only in the result which favors the tax collector, not the reasons which justify it.[15]

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[15] *See* Sheldon H. Jaffe, *What a Long Strange Trip It's Been: Court-Created Limitations on Rights of Action for Negligently Furnishing Alcohol*, 72 Wash. L. Rev. 595, 608 (1997) (conflicting holdings are entitled to less precedential authority as they do not live up to principle of predictability that is at core of doctrine of stare decisis).

This case falls within the constitutional "bait and switch" prohibition because at all times material hereto every Washington taxpayer has enjoyed, and even now does enjoy, the statutory right to (1) simply lawfully refuse to pay an unconstitutional tax in the first place, RCW 82.04.4286; (2) seek an injunction against paying an unconstitutional tax, RCW 51.52.113; or (3) pay now and claim a refund later, RCW 82.32.060. Section 3's limitation of remedy is after the fact; it overlays these preexisting remedial statutes and clearly offends the "bait and switch" doctrine set forth in *Reich* and its progeny.

In *Reich* the Supreme Court considered a Georgia statute which, like RCW 82.32.060, provided a right to refund of taxes illegally paid, whether voluntary or not. *Reich*, 513 U.S. at 108-09 (citing Ga. Code Ann. § 48-2-35(a) (Supp. 1994)). But Georgia courts attempted to defeat the preexisting remedy by claiming it did not apply to taxes collected pursuant to an unconstitutional statute. The Georgia Supreme Court therefore denied the statutory refund remedy, claiming due process was satisfied by an unutilized predeprivation process.

The Supreme Court acknowledged states have flexibility with respect to whether they will maintain an exclusively predeprivation remedial scheme, or an exclusively postdeprivation remedial scheme, or a hybrid regime, yet cautioned:

> But what a State may *not* do, and what Georgia did here, is to reconfigure its scheme, unfairly, in *mid-course* – to "bait and switch," as some have described it. Specifically, in the mid-1980's, Georgia held out what plainly appeared to be a "clear and certain" postdeprivation remedy, in the form of its tax refund statute, and then declared, only after Reich and others had paid the disputed taxes, that no such remedy exists.

Reich, 513 U.S. at 111. Washington holds out exactly such a clear and certain remedy for the payment of an unconstitutional tax – a refund, RCW 82.32.060 – but the majority now seeks to deny the right of these taxpayers to exercise that statutory remedy.

Newsweek, Inc. v. Department of Revenue, 522 U.S. 442, 118 S. Ct. 904, 905, 139 L. Ed. 2d 888 (1998) (per curiam) adds force to *Reich*. There considered was suit brought by *Newsweek* magazine against the Florida Department of Revenue seeking refund of sales taxes collected from *Newsweek* magazine between 1988 and 1990, contrary to the First Amendment of the United States Constitution. *Newsweek* claimed Florida's denial of the refund, notwithstanding a preexisting Florida refund statute analogous to Washington's, violated its due process right to relief as defined by *McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990). The Florida trial court dismissed *Newsweek*'s claim attempting to distinguish *McKesson*'s requirement for "meaningful backward-looking relief" based upon Florida law. *Newsweek, Inc.*, 118 S. Ct. at 904 (citing *McKesson*, 496 U.S. at 31). However, the Supreme Court summarily reversed based upon *McKesson* and *Reich*, holding that where state law holds out either a pre- or post-payment remedy during the tax period in question, due process requires the state to continue to offer the remedy and prevents the state from withdrawing that remedy after the fact which was available during the prior taxable period:

> While Florida may be free to require taxpayers to litigate first and pay later, due process prevents it from applying this requirement to taxpayers, like Newsweek, who reasonably relied on the apparent availability of a postpayment refund when paying the tax.

> Newsweek is entitled to a clear and certain remedy and thus it can use the refund procedures to adjudicate the merits of its claim.

Newsweek, Inc., 118 S. Ct. at 905.

But our majority rejects the "bait and switch" argument, asserting the Supreme Court has *"specifically approved the credit remedy set forth in the 1987 remedial legislation."* Majority at 24 (emphasis in the original) (citing *Tyler Pipe*, 483 U.S. at 249). The majority's claim is fanciful since the Supreme Court in June of 1987 certainly had no occasion to "specifically approve" legislation passed nearly two months later! To the contrary, referenced dicta in *Tyler Pipe* deals *not* with a retroactive credit in lieu of preexisting statutory remedies but with prospective credits which might prospectively cure the commerce clause deficiency. *Accord General Motors Corp. v. City & County of San Francisco*, 69 Cal. App. 4th 448, 81 Cal. Rptr. 2d 544, 549 (1999). This dicta is irrelevant on its face to the statutory right of a taxpayer to a refund of an unconstitutional tax actually paid, much less the obvious validity of a defense against paying an unconstitutional tax in the first place.[16]

The majority reasons – despite the fact taxpayers had every reason to believe that they would be entitled to a refund or defense, as that is what our statutes promised them – the taxpayers have not been the victims of duplicity because they still have the right to "challenge" Washington's B & O tax scheme in court. Majority at 23. But what good is a challenge absent a remedy? Chief Justice

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[16] "Either a repeal of the manufacturing tax or an expansion of the multiple activities exemption to provide out-of-state manufacturers with a credit for manufacturing taxes paid to other States would presumably cure the discrimination." *Tyler Pipe*, 483 U.S. at 249. *See also National Can II*, 109 Wn.2d at 889 (describing tax credit suggestion by United States Supreme Court as "dicta").

John Marshall proclaimed in *Marbury*, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury" and "One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. 137, 163, 1 Cranch 137, 2 L. Ed. 60 (1803). Following up this observation the Chief Justice relied upon Lord Blackstone for the proposition "every right, when withheld, must have a remedy, and every injury its proper redress"; and then drew the circle to its close in language so plain even today's majority cannot hide from its mandate:

> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve the high appellation, if the laws furnish no remedy for the violation of a vested right.

Marbury, 5 U.S. at 163.[17]

The majority's sophistry was most recently, and pointedly, rejected by the Supreme Court in *Reich*:

> [T]the Georgia Supreme Court's reliance on Georgia's predeprivation procedures was entirely beside the point (and thus error), because even assuming the constitutional adequacy of these procedures – an issue on which we express no view – no reasonable taxpayer would have thought that they represented, in

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[17] *See also* Holt, C.J., in *Ashby v. White*, 2 Ld. Raym. 938, 92 Eng. Rep. 126 (1703) ("it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal"); and *see Willcox v. Penn Mut. Life Ins. Co.*, 357 Pa. 581, 600, 55 A.2d 521, 530-31, 174 A.L.R. 220 (1947) ("Not only is the maxim "ubi jus ibi remedium – where there is a right there is a remedy – one of the proudest declarations of the common law, but it necessarily implies that a right without a remedy is not a right at all but a mere abstraction.").

light of the apparent applicability of the refund statute, the *exclusive* remedy for unlawful taxes.

Reich, 513 U.S. at 111. *Accord Newsweek, Inc.*, 118 S. Ct. at 905. Surely, there is simply no reason taxpayers prior to enactment of the 1987 act would have thought that credit procedures *which did not even then exist* barred plain statutory remedies against collection of unconstitutional taxes![18]

IV.

The 1987 tax credit scheme itself unconstitutionally discriminates against interstate commerce

Ever mindful that "the power to tax is the power to destroy," we must be even more solicitous of the ratifiers' intent that interstate commerce be spared those burdens imposed by discriminatory state and local taxation.[19] "The Supreme Court has traditionally recognized that a large part of the rationale for granting Congress control over interstate commerce 'was to [e]nsure . . . against discriminating State legislation.' " Laurence H. Tribe, *American Constitutional Law* 453 (2d ed. 1988) (citing *Welton v. Missouri*, 91 U.S. (1 Otto) 275, 280, 23 L. Ed. 347 (1875)).

"A State may not 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' " *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 197, 115 S. Ct. 1331, 1344, 131 L. Ed. 2d 261 (1995) (quoting *Northwestern*

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[18] It is true that we upheld tax credits as an excuse for postdeprivation relief subsequent to *Reich. Digital Equip. Corp.*, 129 Wn.2d at 194-95. However, we did so without considering the implications of the Supreme Court's disapproval of an analogous "bait and switch" approach.

[19] *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431, 4 L. Ed. 579 (1819); *cf.* Tribe, *supra*, at 404, 444.

States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458, 79 S. Ct. 357, 3 L. Ed. 2d 421, 67 A.L.R.2d 1292 (1959)).

But this credit scheme discriminates against interstate commerce in both form and substance. First, section 3, as the majority construes it, requires interstate taxpayers seeking a remedy for prior unconstitutional taxation to prove, through a difficult, burdensome, if not impossible, procedure the quantum of foreign taxes actually paid as well as the technical intricacies of foreign taxation to qualify for a credit; whereas in-state businesses are automatically credited the entire amount in the first instance. Second, it is a discriminatory scheme in itself which places the burden on the taxpayer to prove and quantify the specific taxes actually paid to other taxing jurisdictions to obtain the unlikely credit.

A.

Tax credits are discriminatorily more burdensome for interstate taxpayers to obtain than in-state taxpayers

As illustrated by the record in this very proceeding, the discriminatory nature of the tax credit scheme is borne out by the practical nonavailability of such credits to interstate business. In order for the interstate taxpayer to avail himself of the credit, it is necessary to produce voluminous factual documentation[20] from every other

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[20] "The business activity subject to tax, and against which credit(s) is claimed, must involve the same ingredients or product upon which the tax giving rise to the credit(s) was paid. The credits must be product-specific."

WAC 458-20-19301(4)(d).

WAC 458-20-19301(9) provides:

"Recordkeeping requirements. Persons claiming the MATC must keep and preserve such records and documents as may be necessary to prove their entitlement to any credits taken under this system (RCW 82.32.070). It is not required to submit copies

taxing jurisdiction in America for periods increasingly remote in time, without end. As a practical matter, such record-keeping is extremely difficult, even if the necessity

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of such proofs when credits are claimed or together with the Schedule C detail. Rather, such records must be kept for a period no less than five years from the date of the tax return upon which the related tax credits are claimed. Such records are fully subject to audit for confirmation of the validity and amounts of credits taken. Records which must be preserved by persons claiming external tax credits include:

"(a) Copies of sales contracts, or other written or memorialized evidence of any sales agreements, including purchase and billing invoices showing the origin state and destination state of products sold.

"(b) Copies of shipping or other delivery documents identifying the products sold and delivered, reconcilable with the selling documents of subsection (a) above, if appropriate.

"(c) Copies of production reports, transfer orders, and similar such documents which will reflect the intercompany or interdepartmental movement of extracted ingredients or manufactured products where no sale has occurred.

"(d) Copies of tax returns or reports filed with other states' taxing authorities showing the kinds and amounts of taxes paid to such other states for which MATC is claimed.

"(e) Copies of canceled checks or other proofs of actual tax payment to the other state(s) giving rise to the MATC claimed.

"(f) Copies of any other state(s) taxing statutes, laws, ordinances, and other appropriate legal authorities necessary to establish the nature of the other states' tax as a gross receipts tax, as defined in this section.

"(g) Failure to keep and preserve proofs of entitlement to the MATC will result in the denial of credits claimed and the assessment of all taxes offset or reduced by such credits as well as the additional assessment of interest and penalties as required by law. (See RCW 82.32.050.)."

for the records is known in advance, and nearly impossible if the requirement is imposed, as it is here, after the fact. *See General Motors Corp.*, 81 Cal. Rptr. 2d at 548.

This record demonstrates, for example, that such specific documentation may not have been maintained in the first instance in other taxing jurisdictions, or may have been lost or destroyed over the intervening years even if it had.[21] However the failure to originally make, or thereafter maintain, these records is fatal to any claim of the interstate taxpayer for a tax credit whereas an in-state taxpayer has an automatic credit. Thus, as a practical matter, the in-state taxpayer enjoys an automatic 100 percent credit whereas the interstate taxpayer is lucky to recoup 1 percent, if that.[22]

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[21] W.R. Grace's manager of state and local taxes explained that Grace had not kept the extensive records mandated by the WAC because it was not required to do so prior to the effective date of the 1987 act and the WAC regulations applicable to it. Clerk's Papers (CP) (Grace) at 924-25. In the same manner Chrysler, according to its Chief Tax Counsel John L. Loffredo, also failed to keep these records as they were under no obligation to do so. CP (Chrysler) at 541-42. As an example of the injustice perpetrated by our application of the WAC regulations, consider the case of W.R. Grace which has "sold at least five of the divisions against which Washington tax has been assessed, does not have their records, and does not have the employees who are knowledgeable about their activities during the period 1980 through 1989." CP (Grace) at 925.

[22] For example, according to the Department of Revenue the total external (i.e., interstate) credits for 1988-1989 were $1 million. CP (Grace) at 163. Yet, state estimates showed a total wholesale B & O tax to be paid by out-of-state manufacturers in the 1987-1989 biennium of $150 million. CP (Grace) at 303. Department of Revenue figures show total external credits for 1988 through 1993 of $5.7 million vs. internal credits of $670.30 million. CP (Grace) at 176.

The discriminatory burden placed upon interstate taxpayers to obtain the benefits of a tax credit in excess of that burden placed upon in-state taxpayers is so readily apparent that the lesson is clear to anyone engaged in interstate business that the business is much better off to move in-state so as to claim a B & O credit to both manufacture and sell in-state rather than risk a doubtful and difficult-to-prove credit for performing one of those functions out-of-state. This record demonstrates the cumbersome, if not impossible, procedure to recoup taxes paid in other jurisdictions to offset duplicitous taxes paid by the interstate business under the discriminatory Washington B & O tax falls much more heavily on the shoulders of interstate businesses than on their in-state counterparts.

But even if the taxpayer could carry his burden to prove double taxation in fact, simply placing such a burden on his shoulders itself unconstitutionally discriminates against his commerce.

B.

Interstate taxpayers may not be constitutionally required to prove "specific interstate transactions were subjected to multiple taxation in order to advance claim of discrimination"[23]

There is also the prospect, if not likelihood, that actual taxes paid on business activity in other jurisdictions will not be specifically analogous to the technical intricacies of the Washington B & O tax, thus disqualifying the interstate taxpayer from claiming foreign taxes actually paid as a credit against a Washington tax bill. This is not because interstate businesses do not pay business taxes in other jurisdictions, but because those tax schemes differ in technical aspects from our own. This

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[23] *Tyler Pipe*, 483 U.S. at 242.

discriminatory feature cannot be constitutionally cured even in theory by putting the taxpayer to his proof of actual taxes paid in other jurisdictions; however, even if it could, the burden of this proof, in and of itself, discriminatorily falls on the commerce of the interstate taxpayer. *See General Motors Corp.*, 81 Cal. Rptr. 2d at 547-48.

While the in-state taxpayer has an automatic credit, the interstate taxpayer must not only prove that he actually paid business taxes in another jurisdiction but must also prove the exact analogy of the foreign tax law to our own in order to qualify. This was exactly the burden the state tax collector sought to be placed on the interstate taxpayer to prove his claim in *Tyler Pipe* that the statute was unconstitutional. But that argument was squarely rejected by the Supreme Court in no uncertain terms:

> The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment.

Tyler Pipe, 483 U.S. at 242 n.11,(quoting *Freeman v. Hewit*, 329 U.S. 249, 256, 67 S. Ct. 274, 91 L. Ed. 265 (1946)); *see also City of Winchester v. American Woodmark Corp.*, 252 Va. 98, 471 S.E.2d 495 (1996). However the tax credit scheme at issue here incorporates on its face exactly that discriminatory mechanism which the Supreme Court condemned in the very opinion which struck down the unconstitutional tax which this credit scheme was supposedly enacted to cure: it leaves interstate taxpayers to "the shifting incidence of the varying tax laws of the various states at a particular moment." In pegboard fashion, the vice is suppressed here, only to reappear there: the Supreme Court disclaims any burden on the taxpayer to show how he has been harmed in fact to prove the tax unconstitutional, yet now the state reimposes the same burden by conditioning relief on precisely that.

V.

The commerce clause requires apportionment of gross receipt taxes on interstate business

The final concern is the constitutionality of the gross receipts tax, amended or not, vis-à-vis the claim that it constitutionally must be apportioned, but is not.

> Consistent with the jurisdictional requirements of the due process and commerce clauses, a state may levy a nondiscriminatory tax on an aspect of a multi-state transaction otherwise wholly immune from taxation because interstate in character (such as gross receipts from an out-of-state sale made by a local corporation), if the method by which the tax is measured *apportions* the tax burden in conformity with a formula that rationally relates the amount of the tax to the fraction of interstate activity taking place within the taxing state. Because they seek to derive uniquely local bases for state taxation from otherwise interstate aspects of taxed transactions, apportionment formulas in theory prevent interstate commerce from being cumulatively burdened by repeated taxation of the same incident.[24]

Although we have previously approved the tax at issue here against claims of malapportionment in *National Can Corp. v. Department of Revenue*, 105 Wn.2d 327, 340-42, 732 P.2d 134 (1986), *judgment vacated by Tyler Pipe*, 483 U.S. 232 (*National Can I*), and *American Nat'l Can Corp. v. Department of Revenue*, 114 Wn.2d 236, 239, 787 P.2d 545 (1990), such approval was in the context of a challenge

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[24] Tribe, *supra*, at 465 (footnote omitted); *see also Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 79 S. Ct. 357, 3 L. Ed. 2d 421, 67 A.L.R.2d 1292 (1959).

that *conceded* the tax met the Supreme Court's apportionment requirement. *Id.* at 241. Moreover that holding is ultimately not in accordance with the requirements of the commerce clause viewed from a perspective more enlightened by recent Supreme Court precedent and the more vigorous advocacy of these parties than was the case in presentations leading to previous decisions.[25] We have recognized as fundamental our state commerce clause jurisprudence must yield to Supreme Court precedent rather than repeating our own errors. *See Digital Equip. Corp.*, 129 Wn.2d 177. *See also Tricon, Inc. v. King County*, 60 Wn.2d 392, 394, 374 P.2d 174 (1962) ("The issue here involves the interpretation and application of the federal constitution and we are bound to follow the decisions of the Supreme Court of the United States, which have passed on this issue."); *B.F. Goodrich Co. v. State*, 38 Wn.2d 663, 676, 231 P.2d 325 (1951) ("It scarcely needs be

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[25] Since *American Nat'l Can*, we have, in passing, mentioned that the B & O tax as amended in 1987 "meets constitutional requirements." *Digital Equip. Corp.*, 129 Wn.2d at 182 n.8. However, we made that statement in reliance solely upon *American Nat'l Can*, 114 Wn.2d 236, a case where the taxpayer had conceded that the tax was fairly apportioned. *Id.* at 248. The taxpayer in *Digital* also conceded that it was not necessarily entitled to a refund. *Digital Equip. Corp.*, 129 Wn.2d at 189. Finally, the *Digital* court expressed its opinion on the constitutionality of Washington's B & O tax although that was not an issue before it. *Id.* at 182 n.8. In fact we commented, "[o]ur consideration of the principal issues in this case became acutely academic when counsel for Digital during oral argument conceded that Digital had not been 'double taxed' and consequently suffered no injury under the former unconstitutional tax scheme." *Id.* at 192. Resulting dicta on apportionment is therefore not precedential. *See, e.g., Peterson v. Hagan*, 56 Wn.2d 48, 53, 351 P.2d 127 (1960) (noting general expressions in opinion confined to facts before court and limited to case decided and points actually involved).

said that, with respect to matters involving the Federal constitution, we, as an inferior tribunal, must follow the pronouncements of [the United States Supreme Court] no matter what our private views may be.").

Every state tax must pass a four-part test to comply with the dormant commerce clause. *American Nat'l Can*, 114 Wn.2d at 241 (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977)). To comply, state taxation of interstate business must: (1) tax only interstate activities with a sufficient connection to the taxing state; (2) *be fairly apportioned to the taxpayer's activities in the taxing state;* (3) not discriminate against interstate commerce; and (4) be fairly related to the services provided by the state. *Id.*[26] The taxpayers in *American Nat'l Can* only raised a third prong discrimination challenge, *id.*, but in point of law the Washington scheme of tax credits still does not solve the fair apportionment prong.

Central Greyhound Lines v. Mealey, 334 U.S. 653, 68 S. Ct. 1260, 92 L. Ed. 1633 (1948) controls.[27] It holds fair apportionment of gross receipt taxes is required to pass muster under the dormant commerce clause. The gross receipt tax there considered was nearly identical to that imposed here. New York taxed gross receipts of an interstate bus line traveling between points within the state, but over routes which utilized highways outside the state in Pennsylvania and New Jersey. The gross receipts of

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[26] "Lying back of these decisions is the recognized danger that, to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state." *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45-46 n.2, 60 S. Ct. 388, 84 L. Ed. 565, 128 A.L.R. 876 (1940).

[27] *Cf.* Tribe, *supra*, at 441-42.

these bus tickets were taxed without apportionment (or limitation) to in-state activities.

The United States Supreme Court held these unapportioned gross receipts taxes violated the commerce clause because they were not apportioned to taxing only in-state segments of travel.

The unapportioned New York tax is indistinguishable from Washington's except for Washington's tax credit feature. However it is apparent from *Central Greyhound Lines* that allowance of a tax credit is no defense to a fair apportionment challenge as the Supreme Court there held the tax must be apportioned even if no out-of-state taxes are paid or credited against the domestic tax:

> [E]ven if neither Pennsylvania nor New Jersey sought to tax their proportionate share of the revenue from this transportation, such abstention would not justify the taxing by New York of the entire revenue.

Central Greyhound Lines, 334 U.S. at 663 (citing *Freeman v. Hewit*, 329 U.S. 249, 256, 67 S. Ct. 274, 288, 91 L. Ed. 265 (1946)). By its very nature "an unapportioned gross receipts tax makes interstate transportation bear more than 'a fair share of the cost of the local government whose protection it enjoys.' " *Central Greyhound Lines*, 334 U.S. at 663 (quoting *Freeman*, 329 U.S. at 253). The vice is that "it lays 'a direct burden upon every transaction in [interstate] commerce by withholding, for the use of the State, a part of every dollar received in such transactions.' " *Central Greyhound Lines*, 334 U.S. at 663 (alterations in original) (quoting *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292, 38 S. Ct. 126, 62 L. Ed. 295 (1917)).

Although *Tyler Pipe* seems to discount an apportionment challenge to Washington's gross receipts tax,[28] more

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[28] The Supreme Court declined to discuss the apportionment challenge mounted by local manufacturers who sell interstate, *Tyler*, 483 U.S. at 248 n.16; however, it noted "the

recent Supreme Court authority has reinvigorated the vitality of Central Greyhound's gross receipt tax apportionment requirement, highlighting the critical distinction between gross receipts and sales tax, not their analogy.

As the Supreme Court explained, the apportionment prong of the *Complete Auto Transit* test is required to ensure a state taxes only its fair share of an interstate transaction. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*,

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activity of wholesaling – whether by an in-state or an out-of-state manufacturer – must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax." *Tyler Pipe*, 483 U.S. at 251 (citing *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 280-81, 98 S. Ct. 2340, 57 L. Ed. 2d 197 (1978) and *Standard Pressed Steel Co. v. State Dep't of Revenue*, 419 U.S. 560, 564, 95 S. Ct. 706, 42 L. Ed. 2d 719 (1975)). This wholly intrastate analysis is what makes sales and use taxes acceptable under the dormant commerce clause. *See Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 188-90, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995). If, however, the activity taxed is not truly exclusively intrastate, then the tax must be apportioned. *Id.* Tribe also discounts the apportionment discussion in *Tyler Pipe*, observing that the court then "had no occasion to question [*General Motors Corp. v. Washington*, 377 U.S. 436, 84 S. Ct. 1564, 12 L. Ed. 2d 430 (1964), *overruled by Tyler Pipe Ind., Inc. v. Department of Revenue*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987)] . . . conclusions with respect to nexus and fair apportionment. *Id.* at 2820 n.16." Tribe, *supra*, at 464 n.21.

The two cases cited by the Supreme Court in *Tyler Pipe* during its discussion of apportionment provide some enlightenment. *Standard Pressed Steel* states that the taxpayer challenging the lack of apportionment of a B & O tax, as applied, must show risk of multiple taxation. *Standard Pressed Steel*, 419 U.S. at 563-64. But here the risk of multiple taxation is amply demonstrated. *See supra* section IV. *Moorman*, in turn, merely notes that the holding in *Standard Pressed Steel* found that a tax on the entire gross receipts from sales made in Washington were properly apportioned. *Moorman*, 437 U.S. at 280-81.

514 U.S. 175, 184, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995) (quoting *Goldberg v. Sweet*, 488 U.S. 252, 260-61, 109 S. Ct. 582, 102 L. Ed. 2d 607 (1989)). The question is how to slice up the tax pie among the states in which the taxpayer's activities have contributed to taxable value. *Oklahoma Tax Comm'n*, 514 U.S. at 186. The answer is to apportion the income among the states in which the activity has occurred, and allow taxation only of that portion attributable to activity within that state. *Id.*

Sales taxes do not fit within this formula and thus need not be apportioned because, the Supreme Court reasoned, a sale of goods is best viewed "as a discrete event facilitated by the laws and amenities of the place of sale, and the transaction itself does not readily reveal the extent to which completed or anticipated interstate activity affects the value on which a buyer is taxed." *Oklahoma Tax Comm'n*, 514 U.S. at 186. What saves a sales tax from apportionment challenge is that it does not provide an opportunity for multiple taxation of the same activity, as the tax necessarily falls only once upon the buyer of the goods or services who is taxed on his purchase at a single location. *Id.* at 189-90. However a tax upon gross receipts *does* require apportionment because multiple taxation is possible, as the origin of the taxable value may be extraterritorial. *Id.* (citing *Central Greyhound Lines*, 334 U.S. 653).

Jefferson Lines thus represented a critical clarification of previous Supreme Court precedent on this issue. *See* Walter Hellerstein et al., *Commerce Clause Restraints on State Taxation after* Jefferson Lines, 51 Tax L. Rev. 47, 97-98 (1995); *see also M & Assocs., Inc. v. City of Irondale*, No. 1962143, 1998 WL 432097, at *4 (Ala. July 31, 1998) and *see City of Winchester v. American Woodmark Corp.*, 252 Va. 98, 471 S.E.2d 495 (1996). And it is this clarification which renders questionable the majority's reliance upon earlier

Supreme Court cases,[29] not to speak of cases from our own court,[30] that dismissed apportionment challenges to

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[29] The majority relies upon our earlier reading of *Tyler Pipe*. Majority at 20 (quoting *American Nat'l Can*, 114 Wn.2d at 248, (citing *Tyler Pipe*, 483 U.S. at 253)). *American National Can*, in turn, did no analysis of the question of apportionment, but relied on citations to earlier cases. *American Nat'l Can*, 114 Wn.2d at 248 (citing *Department of Revenue v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 750, 98 S. Ct. 1388, 1399, 55 L. Ed. 2d 682 (1978); *Standard Pressed Steel Co. v. Department of Revenue*, 419 U.S. 560, 564, 95 S. Ct. 706, 709, 42 L. Ed. 2d 719 (1975); *Chicago Bridge & Iron Co. v. Department of Revenue*, 98 Wn.2d 814, 826-30, 659 P.2d 463 (1983)).

These cited cases, in turn, do not offer the support required. First and foremost, they predated the Supreme Court's recent clarification, in *Jefferson Lines*, on the distinction between sales taxes and gross receipt taxes. *Standard Pressed Steel* is very limited. *See supra* n.28. The holding in *Association of Wash. Stevedoring Cos.*, like that in *Standard Pressed Steel*, is predicated on the failure of the respondents to show how the lack of apportionment discriminated against interstate business. *Association of Wash. Stevedoring Cos.*, 435 U.S. at 750. The Court in *Association of Wash. Stevedoring Cos.* also relied upon an analysis that likened the activity taxed to in-state sales. *Id.* Finally, *Chicago Bridge & Iron Co.* applied a sales analysis. 98 Wn.2d at 830.

[30] *Tyler Pipe Indus., Inc. v. Department of Revenue*, 105 Wn.2d 318, 326, 715 P.2d 123 (1986), *judgment vacated by* 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987); *National Can Corp. v. Department of Revenue*, 105 Wn.2d 327, 340-41, 732 P.2d 134 (1986) (*National Can I*), *judgment vacated by Tyler Pipe*, 483 U.S. 232; *American Nat'l Can*, 114 Wn.2d at 248. These cases all predated *Jefferson Lines*. They also relied upon *Association of Wash. Stevedoring Cos.*, *Moorman Mfg.*, *Standard Pressed Steel*, and *Chicago Bridge & Iron Co.*, all cases which offer less than stellar support for the fair apportionment of Washington's B & O tax for reasons given *supra* at notes 28 and 29.

Washington's B & O tax (Majority at 20) by falsely analogizing nexus requirements to apportionment.[31]

The problem is Washington's current B & O tax scheme allows for double taxation by taxing manufacturing, extracting, or wholesaling activities within the state without apportioning, or limiting, the tax to that part of the receipts attributable to value produced in this state only. Credits provided by the 1987 amendments do not eliminate the apportionment problem because the tax still is based on value produced in other taxing jurisdictions. It therefore uniquely *burdens* interstate commerce.

That an apportionment deficiency may not be corrected by allowing interstate businesses to credit similar taxes paid in other jurisdictions also seems quite apparent from the *Jefferson Lines* decision. The fair apportionment requirement implicates concerns of external consistency which look

> not to the logical consequences of cloning [the tax in other jurisdictions],[32] but to the economic justification for the State's claim upon the

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[31] Our holding that the B & O tax was fairly apportioned in *National Can I* was based on our conclusion that this was a tax upon "the privilege of manufacturing or selling within the state" in the sense that minimal nexus requirements were satisfied. However, nexus does not satisfy a requirement for apportionment. *National Can I*, 105 Wn.2d at 341.

[32] Internal consistency exists when the imposition of an identical tax by every state in the Union would add no burden to interstate commerce that intrastate burden would not place interstate commerce at a disadvantage to intrastate commerce. *Jefferson Lines*, 514 U.S. at 185. *See also American Trucking Ass'n v. Scheiner*, 483 U.S. 266, 284, 107 S. Ct. 2829, 97 L. Ed. 2d 226 (1987) ("To pass the 'internal consistency' test, a state tax must be of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.' ") (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 644, 104 S. Ct. 2620, 81 L. Ed. 2d 540 (1984)).

> value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State.

Jefferson Lines, 514 U.S. at 185 (citations omitted). While a properly structured nondiscriminatory tax credit scheme might arguably satisfy concerns of *internal* consistency by diminishing, at least in theory, the prospect of double taxation, *Jefferson Lines* clarifies the *external* consistency requirement for gross receipt taxes can be satisfied only by proper apportionment, as was the rule in *Central Greyhound*, where the court held "taxation of an interstate bus line's gross receipts was constitutionally limited to that portion reflecting miles traveled within the taxing jurisdiction." *Jefferson*, 514 U.S. at 186.

Moreover, as the Supreme court in *Tyler Pipe* specifically held:

> The facial unconstitutionality of Washington's gross receipts tax cannot be alleviated by examining the effect of legislation enacted by its sister States,

Tyler, 483 U.S. at 242, as,

> "[T]he immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment."

Tyler, 483 U.S. at 242 n.11 (quoting *Armco, Inc.*, 467 U.S. at 645 n.8). But that is exactly the burden put on interstate commerce by this tax credit scheme which wholly depends for its utilization upon proof not only of quantification of the actual tax paid in other jurisdictions but proof of the technical subtleties of those divergent tax schemes as well.

VI.

Conclusion

Thus, the majority pays lip service to the commerce clause but does little to protect the freedom of interstate commerce and nothing to protect interstate taxpayers from the avaricious appetite of state taxing authorities which, even to this day, extort payment of unconstitutional taxes while overtly denying taxpayers their statutory defense to payment, as well as their statutory right to refund. The majority's resolution does much *for* the coffers of this state but much *to* the constitutional rights of its citizens.

Until these priorities are reversed, I dissent.

/s/ Sanders, J.
Madsen, J.

APPENDIX B

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

BUFFELEN WOODWORKING CO., et al., Plaintiff, v. STATE OF WASHINGTON DEPARTMENT OF REVENUE, Defendant.	NO. 84-2-01897-3 FINAL JUDGMENT ON MOTION FOR SUMMARY JUDGMENT GRANTING THE MOTION IN PART AND DENYING IN PART (Filed July 18, 1997)

This matter came before the Court on the plaintiffs' motion for partial summary judgment. The Court has considered the pleadings filed in this action, the written and oral motions of the parties, the issues, arguments, and authorities presented by the parties in oral argument before the Court and in the papers filed in this action, and the evidence in the record, consisting of the following pleadings, papers, and evidence:

1. *Allis-Chalmers Corp. et al.*, Docket No. 89-2-02975-5, Complaint for Tax Refund, filed 12/28/89;
2. *Alpac Corp., et al.*, Docket No. 89-2-02989-5, Complaint for Tax Refund, filed 12/29/89;
3. *Aluminum Company of America, et al.*, Docket No. 90-2-03026-9, Complaint for Refund of Excise Taxes, filed 12/27/90;
4. *Aluminum Company of America, et al.*, Docket No. 90-2-03026-9, Amended Complaint for Refund of Excise Taxes, filed 07/21/94;

5. *American Passage Marketing Corp.*, Docket No. 87-2-01660-6, Complaint for Tax Refund, filed 8/28/87;
6. *Bandag Inc.*, Docket No. 86-2-02686-7, Complaint for Tax Refund, filed 12/30/86;
7. *Bayliner Marine Corp.*, Docket No. 87-2-02541-9, Complaint for Tax Refund, filed 12/29/87;
8. *Becor Western Inc.*, Docket No. 87-2-02542-7, Complaint for Tax Refund, filed 12/29/87;
9. *Bridgestone (U.S.A.) Inc., et al.*, Docket No. 87-2-00914-6, Complaint for Tax Refund, filed 5/14/871
10. *Brown & Williamson Tobacco Corp.*, Docket No. 86-2-02685-9, Complaint for Tax Refund, filed 12/30/86;
11. *Brunswick Corp.*, Docket No. 86-2-02571-2, Complaint for Tax Refund, filed 12/12/86;
12. *Buffelen Woodworking Co.*, Docket No. 84-2-01897-3, Complaint for Tax Refund, Filed 12/31/84;
13. *Buffelen Woodworking Co.*, Docket No. 84-2-01897-3, First Amended Complaint for Refund of Taxes, filed 01/21/95;
14. *Cascade Hardwoods, Inc. et al.*, Docket No. 87-2-02549-4, Complaint for Tax Refund, filed 12/29/87;
15. *Down River Forest Products, Inc.*, Docket No. 8a6-2-02679-4, Complaint for Tax Refund, filed 12/30/86;
16. *E.I. Dupont de Nemours and Co.*, Docket No. 87-2-01896-0, Complaint for Tax Refund, filed 10/2/87;
17. *Eastman Kodak Co.*, Complaint for Tax Refund, Docket No. 86-2-02686-4, filed 12/30/86;
18. *General Motors Corporation et al.*, Docket No. 85-2-02373-8, Complaint for Refund of Taxes, filed 12/30/85;

19. *General Motors Corporation et al.*, Amended Complaint for Refund of Taxes, filed 07/21/94;
20. *Geo. A. Hormel & Co.*, Docket No. 86-2-02697-2, Complaint for Tax Refund, filed 12/30/86;
21. *Gerber Products Co.*, Docket No. 87-2-02546-0, Complaint for Tax Refund, filed 12/29/87;
22. *Gifford-Hill Co.*, Docket No. 85-2-02375-4, Complaint for Tax Refund, filed 12/30/85;
23. *Hecla Mining Co.*, Docket No. 87-2-01626-6, Complaint for Tax Refund, filed 8/27/87;
24. *Hewlett-Packard Co.*, Docket No. 87-2-02364-0, Complaint for Tax Refund, filed 12/30/85;
25. *Kimberly-Clark Corporation*, Docket No. 88-2-00517-3, Complaint for Refund of Taxes, filed 03/14/88;
26. *Hygrade Food Products Corp.*, Docket No. 87-2-01868-4, Complaint for Tax Refund, filed 9/29/87;
27. *Mead Corp. (The)*, Docket No. 87-2-01867-6, Complaint for Tax Refund, filed 9/29/87;
28. *Mead Corp. (Zellerbach Paper)*, Docket No. 87-2-02588-5, Complaint for Tax Refund, filed 12/30/87;
29. *Northern Commercial Co.*, Docket No. 86-2-02676-7, Complaint for Tax Refund, filed 12/30/86;
30. *O'Brien International, Inc.*, Docket No. 87-2-02551-6, Complaint for Tax Refund, filed 5/14/87;
31. *Outboard Marine Corp.*, Docket No. 87-2-00915-4, Complaint for Tax Refund, filed 5/14/87;
32. *Owens-Corning Fiberglass Corp.*, Docket No. 86-2-02674-3, Complaint for Tax Refund, filed 12/30/86;
33. *Pepsi Cola Bottling Co. of Everett*, Docket No. 87-2-01083-7, Complaint for Tax Refund, filed 6/11/87;

34. *Pepsico, Inc.*, Docket No. 87-2-01628-2, Complaint for Tax Refund, filed 6/11/87;
35. *Polaroid Corp.*, Docket No. 87-2-02553-2, Complaint for Tax Refund, filed 12/29/87;
36. *R.J. Reynolds Tobacco Co., et al.*, Docket No. 85-2-2369-0, Complaint for Tax Refund, filed 12/30/85;
37. *Recreational Equipment, Inc.*, Docket No. 86-2-02717-1, Complaint for Tax Refund, filed 12/31/86;
38. *Remington Arms, Co., Inc.*, Docket No. 87-2-02378-5, Complaint for Tax Refund, filed 12/30/85;
39. *Sandvik Special Metals Corp.*, Docket No. 85-2-02367-3, Complaint for Tax Refund, filed 12/30/85;
40. *Seawest Industries, Inc.*, Docket No. 86-2-02677-8, Complaint for Tax Refund, filed 12/30/86;
41. *Shell Oil Co.*, Docket No. 86-2-02698-1, Complaint for Tax Refund, filed 12/30/86;
42. *Shields Bag and Printing Co.*, Docket No. 87-2-02060-3, Complaint for Tax Refund, filed 10/23/87;
43. *Signode Corp.*, Docket No. 86-2-02682-4, Complaint for Tax Refund, filed 12/30/86;
44. *Sun Sportswear, Inc.*, Docket No. 87-2-02377-7, Complaint for Tax Refund, filed 12/8/87;
45. *Tektronix Inc.*, Docket No. 85-2-02358-4, Complaint for Tax Refund, filed 12/30/85;
46. *Thermo King Corp.*, Docket No. 87-2-01685-1, Complaint for Tax Refund, filed 9/30/87;
47. *Tillamook County Creamery Ass'n.*, Docket No. 87-2-02557-5, Complaint for Tax Refund, filed 12/29/87;
48. *USX Corp.*, Docket No. 86-2-02568-2, Complaint for Tax Refund, filed 12/12/86;

49. *Western Gear Corp.*, Docket No. 87-2-02558-3, Complaint for Tax Refund, filed 12/29/87;
50. *Western Gear Machinery Co.*, Docket No. 87-2-02559-1, Complaint for Tax Refund, filed 12/29/87;
51. First Administrative Order – Consolidation, filed 3/4/94;
52. Plaintiffs' Motion for Partial Summary Judgment, filed 1/18/96;
53. Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment, filed 1/18/96;
54. Affidavit of John T. Piper in Support of Plaintiffs' Motion for Partial Summary Judgment, together with exhibits and other attachments, filed 1/18/96;
55. Plaintiffs' Motion to Modify Consolidation Order and for Severance, filed 5/8/97;
56. Defendants Opposition to Motion to Modify Consolidation Order and for Severance, filed 5/13/97;
57. Plaintiffs' Reply in Support of Motion to Modify Consolidation Order and for Severance, filed 5/14/97;
58. *Aluminum Company of America, et al.*, Docket No. 90-2-03026-9, Order Granting Consolidation entered 5/15/97;
59. *General Motors Corporation, et al.*, Docket No. 85-2-02373-8, Order Granting Consolidation, entered 5/15/97;
60. *Kimberly Clark Corporation*, Docket No. 88-2-00517-3, Order Granting Consolidation, entered 5/15/97;
61. Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment, filed 5/23/97;

62. Second Affidavit of John T. Piper in Support of Plaintiffs' Motion for Summary Judgment, together with exhibits, filed 5/23/97;
63. Affidavit of Lisa K. Gavran, together with exhibits, filed 5/23/97;
64. Affidavit of Denise Olbrecht, together with exhibits, filed 5/23/97;
65. Affidavit of H.J. Cockrell, together with exhibits, filed 5/23/97;
66. Affidavit of Dan Palumbo filed 5/23/97;
67. Affidavit of Kevin H. Girdano, filed 5/23/97;
68. Affidavit of Claude M. Phenix, filed 5/23/97;
69. Affidavit of David Bayer filed 5/23/97;
70. Affidavit of Joseph P. Wills, Jr. filed 5/23/97;
71. Defendant Department of Revenue's Motion to Strike Piper Affidavits and supporting memorandum, filed June 9, 1997;
72. Defendant Department of Revenue's Motion to Strike Plaintiffs' Partial Summary Judgment, filed June 11, 1997;
73. Declaration of Donald F. Cofer in Support of Defendant Department of Revenue's Motion to Strike Plaintiffs' Partial Summary Judgment Motion, filed June 11, 1997;
74. Defendant Department of Revenue's Amended Motion to Strike Piper Affidavits and supporting memorandum, filed June 13, 1997;
75. Defendant Department of Revenue's Motion to Strike Affidavit of Claude M. Phenix and supporting memorandum, filed June 13, 1997;
76. Plaintiffs' Memorandum in Opposition to Motion to Strike Motion for Partial Summary Judgment, filed June 18, 1997;
77. Affidavit of John T. Piper in Support of Plaintiffs' Opposition, filed June 18, 1997;

78. Plaintiffs' Opposition to Motion to Strike Piper Affidavits, filed June 18, 1997;

79. Plaintifís' Opposition to Motion to Strike Portions of Phenix Affidavit, filed June 18, 1997.

The Court has also considered the contentions made by the taxpayers and the defendants in the cases of *Chrysler Motors Corp. v. State of Washington Department of Revenue,* Thurston County Cause No. 94-2-02046-1 and *W.R. Grace Co. – Conn. v. State of Washington Department of Revenue,* Thurston County Cause No. 94-2-00079-6 and this Court's Memorandum Opinions of April 15, 1996 and December 18, 1996, rendered in those cases, which raised issues substantially identical to the issues presented in this consolidated action. The Court has also considered the decision of the Washington Supreme Court in the recent case of *Digital Equipment Corporation v. State of Washington, Department of Revenue,* 129 Wn.2d 177, 916 P.2d 933 (1996).

Based on the arguments of counsel and the pleadings, papers, and evidence presented, the Court finds:

1. No genuine issue of material fact exists concerning any of the legal issues presented to the Court.

2. Plaintiffs are entitled, as a matter of law, to partial summary judgment, thereby resolving all of the plaintiffs' claims in this action.

3. The plaintiffs have conceded that they are unable to establish a claim for retroactive Multiple Activities Tax Credits under RCW 82.04.440 (as amended August 12, 1987).

NOW, THEREFORE, based on the above findings, the Court enters judgment as follows:

1. Defendant's Motion to Strike Plaintiffs' Partial Summary Judgment Motion is denied.

2. Defendant's Motion to Strike Piper Affidavits is denied.

3. Defendant's Motion to Strike Phenix Affidavit is denied.

4. Plaintiff Buffelen et al.'s Motion for Partial Summary Judgment, requested a refund of the taxes at issue, is granted in part and denied in part. Buffelen et al. are granted partial summary judgment that the discrimination ruling in *Tyler Pipe Industries, Inc. v. Washington State Dep't. of Rev.* and *National Can Corp. v. Washington State Dep't of Rev.*, 483 U.S. 232 (1987), is to be applied retroactively. However, the sole relief to which Buffelen et al. are entitled, for all periods on or before June 22, 1987, is to claim credits for gross receipts taxes paid to other jurisdictions as authorized by RCW 82.04.440 (as amended August 12, 1987), in accord with *American Nat'l Can Corp. v. Department of Revenue*, 114 Wn.2d 236; 787 P.2d 545, *cert. Denied*, 498 U.S. 880 (1990), which applied the two-way credit of RCW 82.04.440 retroactively as an exclusive remedy.

5. In so ruling, the Court holds:

(a) That B&O taxes assessed against Buffelen, et al. and the two-way credit of RCW 82.04.440, when applied to periods on or after August 12, 1987, do not violate the Commerce Clause. In reaching this conclusion, the Court considered the arguments raised by Buffelen et al. concerning facial discrimination, compensatory taxes, and lack of fair apportionment, and recent decisions in *Fulton Corporation v. Faulkner*, 516 U.S. ___, 116 S.Ct. 848, 133 L.Ed. 2d 796 (1996), *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. ___, 115 S.Ct. 1331, 131 L.Ed. 2d 261 (1995), *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 114 S.Ct. 2205, 129 L.Ed. 2d 157 (1994), and *Oregon Waste Systems, Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed. 2d 13 (1994);

(b) That the two-way credit enacted in 1987 applies to all tax periods at issue in this case, including retroactively to those periods before August 12, 1987;

(c) That applying the 1987 credit statute retroactively applied to all the tax periods at issue in this case does not violate the Commerce Clause. In reaching this

conclusion, the Court considered: the arguments raised by Buffelen et al. concerning facial discrimination, compensatory taxes, and lack of fair apportionment, and recent decisions in *Fulton Corporation v. Faulkner*, 516 U.S. ___, 116 S.Ct. 848, 133 L.Ed. 2d 796 (1996); *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. ___, 115 S.Ct. 1331, 131 L.Ed. 2d 261 (1995), *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 114 S.Ct. 2205, 129 L.Ed. 2d 157 (1994), and *Oregon Waste Systems, Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 114 S.Ct. 1345, 129 L.Ed. 2d 13 (1994);

(d) In applying the 1987 credit statute retroactively to the tax periods at issue in this case, the Court considered the argument raised by Buffelen et al. in reliance on the recent decision *In re Shepard*, 127 Wn.2d 185, 193, 898 P.2d 828 (1995) including a separation of powers contention; and

(e) That applying the 1987 credit statute retroactively as the sole remedy for a tax assessment under the statutory scheme declared unconstitutionally discriminatory in *Tyler Pipe Industries, Inc. v. Washington State Dep't of Rev. and National Can Corp. v. Washington State Dep't of Reve.*, 483 U.S. 232 (1987), requires consideration of due process requirements. *See, for example, McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). Such application does not violate federal due process requirements, even after consideration of the following specific points: (i) the argument raised by Buffelen et al. concerning the United states Supreme Court's decision in *McKesson* holding that a State given meaningful backward-looking relief to taxpayers when a state tax statute is declared unconstitutional; (ii) the prohibition against "bait and switch" remedy tactics by a state condemned in *Reich v. Collins*, 513 U.S. ___, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994); (iii) the burdensomeness of a product-tracing requirement over multiple year period that began up to 17 years ago; and (iv) the judicial restraints on applying tax legislation retroactively.

6. Pursuant to the Court's Order to Modify First Administrative Order – Consolidation and Severing Certain Plaintiffs, entered contemporaneously herewith, this Judgment will be consistent with the Court's First Administrative Order – Consolidation entered on March 4, 1994, and intended to govern subsequent proceedings. That Order provided in pertinent part:

> "2. New and Distinct Action
>
> This order of consolidation discontinues pleading and procedures in the separate actions and creates a single new and distinct action, under the above cause number, in which shall be included and litigated all of the questions presented by the pleadings in the former actions. This consolidation merges, but does not join, the suits into a single action or cause the parties of one action to be parties to another. However, a ruling in the consolidated action applies to each party of each respective action.
>
> 3. Survival of Each Individual Case
>
> Each separate action consolidated herein does not lose its separate identity because of this consolidation. However, these consolidated actions will be treated as a single entity for purposes of rulings, . . . "

Consistent with the First Administrative Order – consolidation, the decisions recited above apply to issues that the parties to this consolidated action have in common. This Judgment fully resolves all claims as to all parties for each plaintiff whose claims remain consolidated under the above caption (identified in Schedule A attached hereto).

7. Final judgment is hereby entered dismissing the claims of all plaintiffs in this consolidated action.

8. In the interest of judicial economy, the Court does not reach any other defenses that the Department of Revenue may have because the dismissal of Plaintiffs'

actions is a complete disposition of all their claims, so that addressing any additional defenses of the Department would be redundant. If, however, an appeal of this action should result in a different rule of law and a remand for determination of any refund due under the different rule of law, nothing in the judgment of this Court shall be construed to bar the Department of Revenue from raising any defenses it may have including those not addressed herein in the interest of judicial economy.

9. A copy of this Final Judgment shall be filed in each of the actions on Schedule A hereto.

DATED this 18th day of July, 1997.

/s/ R.D. Hicks
RICHARD D. HICKS
Judge

Presented by:
BOGLE & GATES P.L.L.C.
/s/ John T. Piper
John T. Piper, WSBA #2910
Scott M. Edwards, WSBA #26455
Attorneys for Plaintiff

Notice of Presentation Waived:

CHRISTINE O. GREGOIRE
Attorney General
/s/ IN OPEN COURT BUT DECLINED TO SIGN
Donald F. Cofer, WSBA #10896
Assistant Attorney General
Attorneys for Defendant

APPENDIX C

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

ANHEUSER-BUSCH, INC., et al.,	)	NO. 86-2-02675-1 (consolidated)
Plaintiff,	)	
v.	)	FINAL JUDGMENT ON MOTION FOR SUMMARY JUDGMENT GRANTING THE MOTION IN PART AND DENYING IN PART
STATE OF WASHINGTON DEPARTMENT OF REVENUE,	)	
Defendant.	)	(Filed July 18, 1997)

This matter came before the Court on the plaintiffs' motion for partial summary judgment. The Court has considered the pleadings filed in this action, the written and oral motions of the parties, the issues, arguments, and authorities presented by the parties in oral argument before the Court and in the papers filed in this action, and the evidence in the record, consisting of the following pleadings, papers, and evidence:

1. *Anheuser-Busch, Inc.*, Docket No. 86-2-02675-1, Complaint for Tax Refund, filed 12/30/86;
2. *Apple Computer, Inc.*, Docket No. 86-2-00556-8, complaint for Tax Refund, filed 3/18/86;
3. *Herman Miller, Inc.*, Docket No. 87-2-01084-5, Complaint for Tax Refund, filed 6/11/87;
4. First Administrative Order – Consolidation, filed 3/4/94;

5. Plaintiffs' Motion for Partial Summary Judgment, Filed 1/18/96;
6. Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment, filed 1/18/96;
7. Affidavit of John T. Piper in Support of Plaintiffs' Motion for Partial Summary Judgment, together with exhibits and other attachments, filed 5/23/97;
8. Plaintiffs' Motion to Modify Consolidation Order and for Severance, filed 5/8/97;
9. Defendants Opposition to Motion to Modify Consolidation Order and for Severance, filed 5/13/97;
10. Plaintiffs' Reply in Support of Motion to Modify Consolidation Order and for Severance, filed 5/14/97;
11. *Aluminum Company of America, et al.*, Docket No. 90-2-03026-9, Order Granting Consolidation, entered 5/15/97;
12. *General Motors Corporation, et al.*, Docket No. 85-2-02373-8, Order Granting Consolidated, entered 5/15/97;
13. *Kimberly Clark Corporation*, Docket No. 88-2-00517-3, Order Granting Consolidation, entered 5/15/97;
14. Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment, filed 5/23/97;
15. Second Affidavit of John T. Piper in Support of Plaintiffs' Motion for Summary Judgment, together with exhibits, filed 5/23/97;
16. Affidavit of Lisa K. Gavran, together with exhibits, filed 5/23/97;

17. Affidavit of Denise Olbrecht, together with exhibits, filed 5/23/97;
18. Affidavit of H.J. Cockrell, together with exhibits, filed 5/23/97;
19. Affidavit of Dan Palumbo, filed 5/23/97;
20. Affidavit of Kevin H. Girdano, filed 5/23/97;
21. Affidavit of Claude M. Phenix, filed 5/23/97;
22. Affidavit of David Bayer, filed 5/23/97;
23. Affidavit of Joseph P. Wills, Jr., filed 5/23/97;
24. Defendant Department of Revenue's Motion to Strike Piper Affidavits and supporting memorandum filed June 9, 1997;
25. Defendant Department of Revenue's Motion to Strike Plaintiffs'; Partial Summary Judgment, filed June 11, 1997;
26. Declaration of Donald F. Cofer in Support of Defendant Department of Revenue's Motion to Strike Plaintiffs' Partial Summary Judgment Motion, filed June 11, 1997;
27. Defendant Department of Revenue's Amended Motion to Strike Piper Affidavits and supporting memorandum, filed June 13, 1997;
28. Defendant Department of Revenue's Motion to Strike Affidavit of Claude M. Phenix and supporting memorandum, filed June 13, 1997;
29. Plaintiffs' Memorandum in Opposition to Motion to Strike Motion for Partial Summary judgment, filed June 18, 1997;
30. Affidavit of John T. Piper in Support of Plaintiffs' Opposition, filed June 18, 1997;

31. Plaintiffs' Opposition to Motion to Strike Piper Affidavits, filed June 18, 1997;
32. Plaintiffs' Opposition to Motion to Strike Portions of Phenix Affidavit, filed June 18, 1997.

The Court has also considered the contentions made by the taxpayers and the defendant in the cases of *Chrysler Motors Corp. v. State of Washington Department of Revenue,* Thurston County Cause No. 94-2-02046-1 and *W.R. Grace Co., – Conn. v. State of Washington Department of Revenue,* Thurston County Cause No. 94-2-00079-6 and this Court's Memorandum Opinions of April 15, 1996 and December 18, 1996, rendered in those cases, which raised issues substantially identical to the issues presented in this consolidated action. The Court has also considered the decision of the Washington Supreme Court in the recent case of *Digital Equipment Corporation v. State of Washington, Department of Revenue,* 129 Wm.2d 177, 916 P.2d 933 (1996).

Based on the arguments of counsel and the pleadings, papers, and evidence presented, the Court finds:

1. No genuine issue of material facts exists concerning any of the legal issues presented to the Court.

2. Plaintiffs are entitled, as a matter of law, to partial summary judgment, thereby resolving each plaintiffs' constitutional claims in this action.

3. The plaintiffs have conceded that they are unable to establish a claim for retroactive Multiple Activities Tax Credits under RCW 82.04.440 (as amended August 12, 1987).

NOW, THEREFORE, based on the above findings, the Court enters judgment as follows:

1. Defendant's Motion to Strike Plaintiffs' Partial Summary Judgment Motion is denied.

2. Defendants' Motion to Strike Piper Affidavits is denied.

3. Defendant's Motion to Strike Phenix Affidavits is denied.

4. Plaintiffs *Anheuser-Busch, et. al.'s* Motion for Partial Summary Judgment, requesting a refund of the taxes at issue, is granted in part and denied in part. *Anheuser-Busch, et al.* are granted partial summary judgment that the discrimination ruling in *Tyler Pipe Industries, Inc. v. Washington State Dep't of Rev. and National Can Corp. v. Washington State Dep't of Rev.*, 483 U.S. 232 (1987), is to be applied retroactively. However, the sole relief to which *Anheuser-Busch, et al.* are entitled, for all periods on or before June 22, 1987, is to claim credits for gross receipts taxes paid to other jurisdictions as authorized by RCW 82.04.440 (as amended August 12, 1987), in accord with *American Nat'l Can Corp. v. Department of Revenue*, 114 Wn.2d 236; 787 P.2d 545, *cert. denied*, 498 U.S. 880 (1990), which applied the two-way credit of RCW 82.04-440 retroactively as an exclusive remedy.

5. In so ruling, this Court holds:

(a) That B&O taxes assessed against *Anheuser-Busch, et al.* and the two-way credit of RCW 82.04.440, when applied to periods on or after August 12, 1987, do not violate the Commerce Clause. In reaching this conclusion, the Court considered the arguments raised by *Anheuser-Busch, et al.* concerning facial discrimination, compensatory taxes, and lack of fair apportionment, and recent decisions in *Fulton Corporation v. Faulkner*, 516 U.S. ___, 116 S.Ct. 848, 133 L.Ed. 2d 796 (1996), *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. ___, 115 S.Ct. 1331, 131 L.Ed. 2d 261 (1995), *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 114 S.Ct. 2205, 129 L.Ed. 2d 157 (1994), and *Oregon Waste Systems, Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed. 2d 13 (1994);

(b) That the two-way credit enacted in 1987 applies retroactively to all tax periods at issue in this case, including those before August 12, 1987;

(c) That applying the 1987 credit statute retroactively applied to all the tax periods at issue in this case does not violate the commerce clause. In reaching this conclusion, the Court considered: the arguments raised by *Anheuser-Busch, et al.* concerning facial discrimination, compensatory taxes, and lack of fair apportionment, and recent decisions in *Fulton Corporation v. Faulkner*, 516 U.S. ___, 116 S.Ct. 848, 133 L.Ed. 2d 796 (1996); *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. ___, 115 S.Ct. 1331, 131 L.Ed. 2d 261 (1995), *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 114 S.Ct. 2205, 129 L.Ed. 2d 157 (1994), and *Oregon Waste Systems, Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 114 S.Ct. 1345, 129 L.Ed. 2d 13 (1994);

(d) In applying the 1987 credit statute retroactively to the tax periods at issue in this case, the Court considered the argument raised by *Anheuser-Busch, et al.* in reliance on the recent decision *In re Shepard*, 127 Wn.2d 185, 193, 898 P.2d 828 (1995) including a separation of powers contention; and

(e) That applying the 1987 credit statute retroactively as the sole remedy for a tax assessment under the statutory scheme declared unconstitutionally discriminatory in *Tyler Pipe Industries, Inc. v. Washington State Dep't of Rev. and National Can Corp. v. Washington State Dep't of Reve.*, 483 U.S. 232 (1987), requires consideration of due process requirements. *See, for example, McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). Such application does not violate federal due process requirements, even after consideration of the following specific points: (i) the argument raised by *Anheuser-Busch, et al.* concerning the United States Court's decision in *McKesson* holding that a State give meaningful backward-looking relief to taxpayers when a state tax statute is declared unconstitutional; (ii) the prohibition against "bait and switch" remedy tactics by a state condemned in *Reich v. Collins*, 513 U.S. ___, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994); (iii) the burdensomeness of a product-tracing

requirement over multiple year period that began up to 17 years ago; and (iv) the judicial restraints on applying tax legislation retroactively.

6. Pursuant to the Court's Order Modifying First Administrative Order-Consolidation and Severing Certain Plaintiffs, entered contemporaneously herewith, this Judgment will be consistent with the Court's First Administrative Order – Consolidation entered on March 4, 1994, and intended to govern subsequent proceedings. That Order provided in pertinent part:

> "2. New and Distinct Action
>
> This order of consolidation discontinued pleading and procedures in the separate actions and creates a single new and distinct action, under the above cause number, in which shall be included and litigated all of the questions presented by the pleadings in the former actions. This consolidation merges, but does not join, the suits into a single action or cause the parties of one action to be parties to another. However, a ruling in the consolidated action applies to each party of each respective action.
>
> 3. Survival of Each Individual Case
>
> Each separate action consolidated herein does not lose its separate identity because of this consolidation. However, these consolidated actions will be treated as a single entity for purposes of rulings, . . . "

Consistent with the First Administrative Order – Consolidation, the decisions recited above apply to the constitutional issues that the plaintiffs named in this Final Judgment have in common. The issue raised by these plaintiffs to the effect that the sales on which they paid the subject taxes occurred outside the state of Washington and were not properly subject to Washington State taxes, is not decided herein and remains in the separate actions of these plaintiffs.

7. Final judgment is hereby entered dismissing the constitutional claims of the plaintiffs named in this Final Judgment.

8. In the event that this decision should be considered as other than a Final Judgment, the Court finds as follows:

a. The constitutional issues decided by this judgment are of great significance both to the parties to this action and many other taxpayers. A delay in resolution of such issues – and the resulting perpetuation of uncertainties in important tax laws, tax liabilities, and tax revenues – would work a hardship on plaintiffs and on this Court, which has an obligation to decide long standing cases without undue delay.

b. Claims presented by an individual plaintiff in its complaint as described in paragraph 6 above, and not decided hereby are properly severed to facilitate appeal of the judgment hereby entered.

Based on the specific findings set forth above, the Court determines that there is no just cause for delay in the entry of final judgment on Plaintiffs' claims for refund based upon a retroactive application of *Tyler Pipe* and the remedy resulting therefrom. The Court therefore directs the entry of final judgment on those claims in accordance with paragraph 6 above. The Court thus certifies that this is a final, appealable judgment pursuant to CR 54(b).

9. In the interest of judicial economy, the Court does not reach any other defenses that the Department of Revenue may have because the dismissal of Plaintiffs' actions is a complete disposition of all their claims, so that addressing any additional defenses of the Department would be redundant. If, however, an appeal of this action should result in a different rule of law and a remand for determination of any refund due under the

different rule of law, nothing in the judgment of this Court shall be construed to bar the Department of Revenue from raising any defenses it may have including those not addressed herein in the interest of judicial economy.

10. A copy of this order shall be filed in each of the actions on Exhibit 1 hereto.

DATED this 18th day of July, 1997.

/s/ R.D. Hicks
RICHARD D. HICKS
Judge

Presented by:

BOGLE & GATES P.L.L.C.

/s/ John T. Piper
John T. Piper, WSBA #2910
Scott M. Edwards, WSBA #26455
Attorneys for Plaintiff

Notice of Presentation Waived:

CHRISTINE O. GREGOIRE
Attorney General

In Open Court but declined to sign
Donald F. Cofer, WSBA #10896
Assistant Attorney General
Attorneys for Defendant

APPENDIX D

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

United States Constitution, Amendment XIV:

Section 1. No State shall . . . deprive any person of life, liberty or property without due process of law.

United States Constitution, Article I:

Section 8. The Congress shall have Power . . . ;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .

Revised Code of Washington (1989)

82.04.220. Business and occupation tax imposed. There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

82.04.240. Tax on manufacturers. Upon every person . . . engaging within this state in business as a manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including byproducts, manufactured, multiplied by the rate of forty four one hundredths of one percent.

The measure of the tax is the value of the products, including byproducts, so manufactured

regardless of the place of sale or the fact that deliveries may be made to points outside the state.

82.04.270. Tax on wholesalers, distributors (1) Upon every person . . . engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of forty four one hundredths of one percent.

82.04.4286. Deductions – Nontaxable business. In computing tax there may be deducted from the measure of tax amounts derived from business which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States.

82.04.440. Persons taxable on multiple activities – Credits. (1) Every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in.

(2) Persons taxable under RCW 82.04.250, 82.04.270, or 82.04.260(4) with respect to selling products in this state shall be allowed a credit against those taxes for any (a) manufacturing taxes paid with respect to the manufacturing of products so sold in this state, and/or (b) extracting taxes paid with respect to the extracting of products so sold in this state or ingredients of products so sold in this state. Extracting taxes taken as credit under subsection (3) of this section may also be taken under this subsection, if otherwise allowable under this subsection. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the sale of those products.

(3) Persons taxable under RCW 82.04.240 or 82.04.260(1)(b) shall be allowed a credit against those

taxes for any extracting taxes paid with respect to extracting the ingredients of the products so manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the manufacturing of those products.

(4) Persons taxable under RCW 82.04.230, 82.04.240, or 82.04.260 (1), (2), (4), or (6) with respect to extracting or manufacturing products in this state shall be allowed a credit against those taxes for any (i) gross receipts taxes paid to another state with respect to the sales of the products so extracted or manufactured in this state, (ii) manufacturing taxes paid with respect to the manufacturing of products using ingredients so extracted in this state, or (iii) manufacturing taxes paid with respect to manufacturing activities completed in another state for products so manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the extraction or manufacturing of those products.

(5) For the purpose of this section:

(a) "Gross receipts tax" means a tax:

(i) Which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which the deductions allowed would not constitute the tax an income tax or value added tax; and

(ii) Which is also not, pursuant to law or custom, separately stated from the sales price.

(b) "State" means (i) the state of Washington, (ii) a state of the United States other than Washington, or any political subdivision of such other state, (iii) the District of Columbia, and (iv) any foreign country or political subdivision thereof.

(c) "Manufacturing tax" means a gross receipts tax imposed on the act or privilege of engaging in business as a manufacturer, and includes (i)

the taxes imposed in RCW 82.04.240 and 82.04.260 (1), (2), and (4), and (ii) similar gross receipts taxes paid to other states.

(d) "Extracting tax" means a gross receipts tax imposed on the act or privilege of engaging in business as an extractor, and includes the tax imposed in RCW 82.04.230 and similar gross receipts taxes paid to other states.

(e) "Business", "manufacturer", "extractor", and other terms used in this section have the meanings given in RCW 82.04.020 through 82.04.212, notwithstanding the use of those terms in the context of describing taxes imposed by other states.

82.04.500. Tax part of operating overhead. It is not the intention of this chapter that the taxes herein levied upon persons engaging in business be construed as taxes upon the purchasers or customers, but that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons.

82.32.060. Excess payment of tax, penalty, or interest – Credit or refund – Payment of judgments for refund. If, upon receipt of an application by a taxpayer for a refund or for an audit of the taxpayer's records, or upon an examination of the returns or records of any taxpayer, it is determined by the department that within the statutory period for assessment of taxes prescribed by RCW 82.32.050 a tax has been paid in excess of that properly due, the excess amount paid within such period shall be credited to the taxpayer's account or shall be refunded to the taxpayer, at the taxpayer's option. No refund or credit shall be made for taxes paid more than four years prior to the beginning of the

calendar year in which the refund application is made or examination of records is completed.

82.32.180. Court appeal – Procedure. Any person, except one who has failed to keep and preserve books, records, and invoices as required in this chapter and chapter 82.24 RCW, having paid any tax as required and feeling aggrieved by the amount of the tax may appeal to the superior court of Thurston county, within the time limitation for a refund provided in chapter 82.32 RCW. . . .

The trial in the superior court on appeal shall be de novo and without the necessity of any pleadings other than the notice of appeal. At trial, the burden shall rest upon the taxpayer to prove that the tax as paid by the taxpayer is incorrect, either in whole or in part, and to establish the correct amount of the tax. . . .

It shall not be necessary for the taxpayer to protest against the payment of any tax or to make any demand to have the same refunded or to petition the director for a hearing in order to appeal to the superior court, but no court action or proceeding of any kind shall be maintained by the taxpayer to recover any tax paid, or any part thereof, except as herein provided.

* * *

82.32.300. Department of revenue to administer. The administration of this and chapters 82.04 through 82.27 RCW of this title is vested in the department of revenue . . .

The department of revenue shall make and publish rules and regulations, not inconsistent therewith, necessary to enforce their provisions which shall have the same force and effect as if specifically included therein, unless declared invalid by the judgment of a court of record not appealed from.

Washington Administrative Code

458-20-19301. Multiple activities tax credits.

(1) Introduction. Under the provisions of RCW 82.04.440 as amended effective August 12, 1987, Washington state's business and occupation taxes imposed under chapter 82.04 RCW were adjusted to achieve constitutional equality in the tax treatment of persons engaged in intrastate commerce (within this state only) and interstate commerce (between Washington and other states). The business and occupation tax system taxes the privilege of engaging in specified business activities based upon "gross proceeds of sales" (RCW 82.04.070) and the "value of products" (RCW 82.04.450) produced in this state. In order to maintain the integrity of this taxing system, to eliminate the possibility of discrimination between taxpayers, and to provide equal and uniform treatment of persons engaged in extracting, manufacturing, and/or selling activities regardless of where performed, a statutory system of internal and external tax credits was adopted, effective August 12, 1987. This tax credits system replaces the multiple activities exemption which, formerly, assured that the gross receipts tax would be paid only once by persons engaged in more than one taxable activity in this state in connection with the same end products. Unlike the multiple activities exemption which only prevented multiple taxation from within this state, the credits of the new system apply for gross receipts taxes paid to other taxing jurisdictions outside this state as well.

(2) Definitions. For purposes of this section the following terms will apply.

(a) "Credits" means the multiple activities tax credit(s) authorized under this statutory system also referred to as MATC.

(b) "Gross receipts tax" means a tax:

(i) Which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which the deductions allowed would not constitute the tax an income tax or value added tax; and

(ii) Which is not, pursuant to law or custom, separately stated from the selling price.

(c) "Extracting tax" means a gross receipts tax imposed on the act or privilege of engaging in business as an extractor, and includes the tax imposed by RCW 82.04.230 (tax on extractors) and similar gross receipts taxes paid to other states.

(d) "Manufacturing tax" means a gross receipts tax imposed on the act or privilege of engaging in business as a manufacturer, and includes:

(i) The taxes imposed in RCW 82.04.240 (tax on manufacturers) and subsections (2) through (5) and (7) of RCW 82.04.260 (tax on special manufacturing activities) and

(ii) Similar gross receipts taxes paid to other states.

The term "manufacturing tax," by nature, includes a gross receipts tax upon the combination of printing and publishing activities when performed by the same person.

(e) "Selling tax" means a gross receipts tax imposed on the act or privilege of engaging in business as a wholesaler or retailer of tangible personal property in this state or any other state. The term "selling" has its common and ordinary meaning and includes the acts of making either wholesale sales or retail sales or both.

(f) "State" means:

(i) The state of Washington,

(ii) A state of the United States other than Washington or any political subdivision of such other state,

(iii) The District of Columbia,

(iv) Territories and possessions of the United States, and

(v) Any foreign country or political subdivision thereof.

(g) "Taxes paid" means taxes legally imposed and actually paid in terms of money, credits, or other emoluments to a taxing authority of any "state." The term does not include taxes for which liability for payment has accrued but for which payment has not actually been made. This term also includes business and occupation taxes being paid to Washington state together with the same combined excise tax return upon which MATC are taken.

(h) "Business," "manufacturer," "extractor," and other terms expressly defined in RCW 82.04.020 through 82.04.212 have the meanings given in those statutory sections regardless of how the terms may be used for other states' taxing purposes.

(3) Scope of credits. This integrated tax credits system is intended to assure that gross receipts from sales or the value of products determined by such gross receipts are taxed only one time, whether the activities occur entirely within this state or both within and outside this state. External tax credits arise when activities are taxed in this state and similar activities with respect to the same products produced and sold are also subject to similar taxes outside this state. There are five ways in which external tax credits may arise because of taxes paid in other states.

(a) Products or ingredients are extracted (taken from the ground) in this state and are manufactured or sold and delivered in another state which imposes a gross receipts tax on the latter activity(s). The credit created by payment of the other state's tax

may be used to offset the Washington extracting tax liability.

(b) Products are manufactured, in whole or in part, in this state and sold and delivered in another state which imposes a gross receipts tax on the selling activity. Again, payment of the other state's tax may be taken as a credit against the Washington manufacturing tax liability.

(c) Conversely, products or ingredients are extracted outside this state upon which a gross receipts tax is paid in the state of extracting, and which are sold and delivered to buyers here. The other state tax payment may be taken as a credit against Washington's selling taxes.

(d) Similarly, products are manufactured, in whole or in part, outside this state and sold and delivered to buyers here. Any other state's gross receipts tax on manufacturing may be taken as a credit against Washington's selling tax.

(e) Products are partly manufactured in this state and partly in another state and are sold and delivered here or in another state. The combination of all other states' gross receipts taxes paid may be taken as credits against Washington's manufacturing and/or selling taxes.

Thus, the external tax credits may arise in the flow of commerce, either upstream or downstream from the taxable activity in this state, or both. Products extracted in another state, manufactured in Washington state, and sold and delivered in a third state may derive credits for taxes paid on both of the out of state activities.

Internal tax credits arise from multiple business activities performed entirely within this state, all of which are now subject to tax, but with the integrated credits offsetting the liabilities so that tax is only

paid once on gross receipts. Under this system Washington extractors and manufacturers who sell their products in this state at wholesale and/or retail must report the value of products or gross receipts under each applicable tax classification. Credits may then be taken in the amount of the extracting and/or manufacturing tax paid to offset the selling taxes due. There are three ways in which credits may arise because of taxes paid exclusively in this state.

(f) Products are extracted in Washington and directly sold in Washington. Extracting business and occupation tax and selling business and occupation tax must both be reported but the payment of the former is a credit against the latter.

(g) Similarly, ingredients are extracted in Washington and manufactured into new products in this state. The extracting business and occupation tax reported and paid may be taken as a credit against manufacturing tax reported.

(h) Products manufactured in Washington are sold in Washington. Again, the payment of the manufacturing tax reported may be credited against the selling tax (wholesaling and/or retailing business and occupation tax) reported.

All of the external and internal tax credits derived from any flow of commerce may be used, repeatedly if necessary, to offset other tax liabilities related to the production and sale of the same products.

(4) Eligibility for taking credits. Statutory law places the following eligibility requirements and limitations upon the MATC system.

(a) The amount of the credit(s), however derived, may not exceed the Washington tax liability against which the credit(s) may be used. Any excess of credit(s) over liability may not be carried over or used for any purpose.

(b) The person claiming the credit(s) must be the same person who is legally obligated to pay both the taxes which give rise to the credit(s) and the taxes against which the credit is claimed. The MATC is not assignable.

(c) The taxes which give rise to the credit(s) must be actually paid before credit may be claimed against any other tax liability. Tax liability merely accrued is not creditable.

(d) The business activity subject to tax, and against which credit(s) is claimed, must involve the same ingredients or product upon which the tax giving rise to the credit(s) was paid. The credits must be product-specific.

(e) The effective date for developing and claiming credit(s) for products manufactured in Washington state and sold and delivered in other states which impose gross receipts selling taxes is June 1, 1987.

(f) The effective date for developing and claiming all credits other than those explained in subsection (e) above, is August 12, 1987.

(g) Persons who are engaged only in making wholesale or retail sales of tangible personal property which they have not extracted or manufactured are not entitled to claim MATC. Also, persons engaged in rendering services in this state are not so entitled, even if such services have been defined as "retail sales" under RCW 82.04.050. (See WAC 458-20-194 for rules governing apportionment of gross receipts from interstate services.)

(5) Other states' qualifying taxes. The law defines "gross receipts tax" paid to other states to exclude income taxes, value added taxes, retail sales taxes, use taxes, or other taxes which are generally stated separately from the selling price of products sold. Only those taxes imposed by other states which

include gross receipts of a business activity within their measure or base are qualified for these credit(s). The burden rests with the person claiming any MATC for other states' taxes paid to show that the other states' tax was a tax on gross receipts as defined herein. Gross receipts taxes generally include:

(a) Business and occupation privileges taxes upon extracting, manufacturing, and selling activities which are similar to those imposed in Washington state in that the tax measure or base is not reduced by any allocation, apportionment, or other formulary method resulting in a downward adjustment of the tax base. If costs of doing business may be generally or routinely deducted from the tax base, the tax is not one which is similar to Washington state's gross receipts tax.

(b) Severance taxes measured by the selling price of the ingredients or products severed (oil, logs, minerals, natural products, etc.) rather than measured by costs of production, stumpage values, the volume or number of units produced, or some other formulary tax base.

(c) Business franchise or licensing taxes measured by the gross volume of business in terms of gross receipts or other financial terms rather than units of production or the volume of units sold.

Other states' tax payments claimed for MATC must be identifiable with the same ingredients or products which incurred tax liability in Washington state, i.e., they must be product specific.

(d) The department will periodically publish an excise tax bulletin listing current taxes in other jurisdictions which are either qualified or disqualified for credit under the MATC system.

* * *

(9) Recordkeeping requirements. Persons claiming the MATC must keep and preserve such records and documents as may be necessary to prove their entitlement to any credits taken under this system (RCW 82.32.070). It is not required to submit copies of such proofs when credits are claimed or together with the Schedule C detail. Rather, such records must be kept for a period no less than five years from the date of the tax return upon which the related tax credits are claimed. Such records are fully subject to audit for confirmation of the validity and amounts of credits taken. Records which must be preserved by persons claiming external tax credits include:

(a) Copies of sales contracts, or other written or memorialized evidence of any sales agreements, including purchase and billing invoices showing the origin state and destination state of products sold.

(b) Copies of shipping or other delivery documents identifying the products sold and delivered, reconcilable with the selling documents of subsection (a) above, if appropriate.

(c) Copies of production reports, transfer orders, and similar such documents which will reflect the intercompany or interdepartmental movement of extracted ingredients or manufactured products where no sale has occurred.

(d) Copies of tax returns or reports filed with other states' taxing authorities showing the kinds and amounts of taxes paid to such other states for which MATC is claimed.

(e) Copies of cancelled checks or other proofs of actual tax payment to the other state(s) giving rise to the MATC claimed.

(f) Copies of any other state(s) taxing statutes, laws, ordinances, and other appropriate legal authorities necessary to establish the nature of the

other states' tax as a gross receipts tax, as defined in this section.

(g) Failure to keep and preserve proofs of entitlement to the MATC will result in the denial of credits claimed and the assessment of all taxes offset or reduced by such credits as well as the additional assessment of interest and penalties as required by law. (See RCW 82.32.050.)

(10) MATC in combination with other credits. The tax credits authorized under this system may be taken in combination with other tax credits available under Washington law. Such other credit programs, however, authorize credit carryovers from reporting period to period until the credits are fully utilized. Thus, the MATC must be computed and used to offset business and occupation tax liabilities during any tax reporting period before any other program credits to which a claimant may be entitled are claimed or applied. Failure to compute and take the MATC before applying other available credits may result in the loss of the other credit benefits.

(11) Superseding provisions. The MATC provisions of this section supersede and control the provisions of other sections of chapter 458-20 WAC (other tax rules) relating to intrastate, interstate, and foreign transactions to the extent that such provisions are or appear to be contrary or conflicting.

(12) Unique or special credit situations – Appeals. The provisions of this section generally explain the nature of the MATC system and the tax credit qualifications, limitations, and claiming procedures. The complexity of the integrated tax reporting and credit taking procedures may develop situations or questions which are not addressed herein. Such matters and requests for specialized rulings should be submitted to the department of revenue for prior determination before credits are

claimed. Generally, prior determinations will be provided within sixty days after the department receives the information necessary to make such a ruling. Adverse rulings, tax credit denials, or tax assessments resulting from audits or other examinations of returns upon which the MATC is claimed may be administratively appealed under the provisions of chapter 82.32 RCW and WAC 458-20-100.

APPENDIX E

Rule 29.6 List of Petitioner Corporations and Their Parents and Non-Wholly Owned Subsidiaries

PETITIONER:

A&W Bottling Co. of Seattle, Inc.

PARENT:

Western Bottling Co. (an indirect wholly owned subsidiary of Pepsico, Inc.)

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

ALCOA, Inc. (formerly Aluminum Company of America, Inc.)

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Allis-Chalmers Corporation (successor to plaintiffs below Allis-Chalmers Corporation, Allis-Chalmers Hydro, Inc. and Allis-Chalmers Pump, Inc.)

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Alpac Corporation

PARENT:

North Pacific Territories Holding Company (85%)
Frito-Lay, Inc (7.5%)
Pepsi Cola Tea Company (7.5%) (all indirect wholly owned subsidiaries of Pepsico, Inc.)

NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Amcord, Inc.
PARENT:
Hanson Aggregates West, Inc. (an indirect wholly owned subsidiary of Hanson, PLC)
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
American Home Products (formerly American Cyanamid Company) (Petitioner also formerly owned Shelton, Inc. a plaintiff below and has retained Shelton's rights in this action)
PARENT:
None
NON-WHOLLY OWNED SUBSIDIARIES:
AHP Holdings PTY Limited
Cyanamid (Pakistan) Limited
Cyanamid Agro Limited
Cyanamid Barranquilla, S.A.
Cyanamid Ireland Limited
Cyanamid Italia, S.p.A.
Cyanamid Kimyevi Madde Ve Ilac
Cyanamid Paraguay S.R.L.
Cyanamid Taiwan Corporation
Fort Dodge Animal Health (China) Ltd.
Fort Dodge Sanidad Animal S.A.
Immunex Corporation
Irbi, S.p.A.
P.T. Dharma Ardha Forma
Sociedad Industrial Y Comercial Cyanamid Chile Limitada
Sutumex, S.A. de C.V.
Wyeth Lederle Japan, Ltd.

Wyeth Lederle Portugal (Farma) Lda.
Yuhan-Cyanamid, Inc.

PETITIONER:
American National Can Company
PARENT:
Pechiney North America, Inc.
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Anheuser-Busch, Inc.
PARENT:
Anheuser-Busch Companies, Inc.
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Apple Computer, Inc.
PARENT:
None
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Bandag Equipment, Inc.
PARENT:
Bandag Incorporated
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Bandag Incorporated
PARENT:
None

NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Basic American, Inc. (formerly Basic American Foods)
PARENT:
None
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Bayliner Marine Corp.
PARENT:
Brunswick Corporation
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Bethlehem Steel Corporation
PARENT:
None
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Bridgestone/Firestone, Inc. (formerly Bridgestone USA, Inc.; formerly Bridgestone Tire Company of America all plaintiffs below)
PARENT:
Bridgestone Corporation
NON-WHOLLY OWNED SUBSIDIARIES:
United States Liberia Radio Corporation
Lakewood Advertising, Inc.
GCR Truck Tire Centers, Inc.
Webco Tire & Auto Service, Inc.

Webco Tire & Wheel, Inc.
Firestone International Sales Corporation
Firestone Foreign Sales Corporation
Compania Anonima Firestone Venezolana
Bridgestone/Firestone de Mexico, S.A.
Firestone de la Argentina S.A.I.C.
Firestone Hispania
Firestone N.Z., Ltd.
Firestone Plantations Company
Firestone Porguguesa S.A.R.L.
Firestone Singapore Pvt. Ltd.
Firestone Tire & Rubber Company of Canada, Ltd.
Harbell Fire & Casualty - Xylos
Harbell Fire & Casualty Co. Ltd.
Industria de Pneumaticos Firestone S.A.
L & C Marine II
L & C Marine III Tapper
N. V. Firestone Belgium S.A.
Numero Un Tire Corporation
Commercial Real Estate Development, Inc.
Credit Card Services, Inc.
Firestone Car Rental, Inc.
Firestone Credit Corporation
Firestone Export Sales Corporation
Firestone Interamerica Company
Firestone International Europe, Inc.
Firestone Tire & Rubber Co (Pacific) LTD
National Telecomputer Services, Inc.

PETITIONER:

Brown and Williamson Tobacco Corp.

PARENT:

BATUS Tobacco Services Inc.

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Brunswick Corporation

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Bucyrus International, Inc. (formerly Bucyrus-Erie Company; formerly Becor Western, Inc. plaintiff below) (Petitioner also formerly owned Western Gear Corporation, a plaintiff below now Lucas Western, Inc., a wholly owned subsidiary of Lucas Industries, Inc. Petitioner has retained the rights of Western Gear Corporation in this action)

PARENT:

American Industrial Partners Acquisition Company, LLC

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Buffelen Woodworking Co.

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Cascade Hardwoods, Inc.

PARENT:

Nicholson Industries, Inc.

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Cooper Industries, Inc. (in its own right and as successor to Edison International)

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Cooper Power Systems, Inc.

PARENT:

Cooper PAC Corporation (a wholly owned subsidiary of Cooper Industries, Inc.)

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Data I/O Corporation

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Del Monte Corporation (in its own right and as successor to Alaska Packers Association, Inc.)

PARENT:

Del Monte Foods Company

NON-WHOLLY OWNED SUBSIDIARIES:

Premier Valley Foods

PETITIONER:

Delco Electronics Services Corporation

PARENT:

General Motors Corporation

NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Down River Forest Products, Inc. (in its own right and as successor to Down River International, Inc.)
PARENT:
Goldenberg Group, Inc.
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
E.I. du Pont de Nemours & Company
PARENT:
None
NON-WHOLLY OWNED SUBSIDIARIES:
Allied Eneabba Pty
ENPAC
DUP-Far Eastern Co
DUP China Ltd
DUP Asia PAC Ltd
DUP Ovrseas Opern
DUP Lanxde Comp LP
PT DUP Ag Prod Indo
Teijin DUP Films LP
REM Arms Co., Inc.
ARA Gavle Ab
ARA Jonkoping AB
DUP Flexitrust
DEC I, Inc.
Augment Tech
Qualicon L.L.C.
Lanxide Armor Co Inc
Lanxide Elec Cpt Inc
Rapid, Inc.
DUP Quimica Venezuel
DUP Elastomers LP

Nyltex
Lospar
Network Faciliation
Holding DP Mexico
DOWI
Equip Indust
DUP Great Eastern
Avtek Corp
DUP Top Cross
Nylmex Fibras
Qualicon Inc
Unimor
Hitachi Chem Dupont
Optimum
Nylmex Services
Bio Tech RSRC
Biotech RSCH Lab Inc
BT&D Tech Amer
Fielmex
Polykron
DUP PTI
Westrade USA
Westrade RC
Westrade Inc.
DUP New Zealand
Griffin Colombia
Griffin LLC
DUP Hyd Per LP
DUP Pharm Co.
Noranda
Conav
DUP Operations Inc
DUP-Akra Poly
Dupek
CDN Hvst USA
Christiana Secr Co
Cine film Sys

DUP Agrichem Caribe
Delta Acquisition
Lanxide Elec Cmpnt
Dupont Polimeros
Colorquim SA DE CV
Com Brasil
Concord Ltd Ptnr
Conexus Cmpt Co
Con Coal Devl Co
DUP/Con Tech
DUP FJ IM LT
DUP FJ IM CO
Com Quimica Peru
DCV Chitin Tech
DCV Biologics
De Riv Coop
Des Quimico Ind
Depuy DUP Orthopd
DNA Plnt Tech Corp
DUP Lnxd Ele
DUP Argntna
E I DUP Poland Brch
E I DUP USSR Ofc
Du Pont Co
DUP Orient Ops Ltd
DUP Austl Ltd
DUP SA DE CV
DUP Japan KK – Korea
DUP Can Inc
DUP China Ltd
DUP De Colombia SA
DUP Conid SPA
DUP Argntna
DUP Deutschland Gmbh
DUP Italiana SPA
DUP Devl SARL
Conoco Hungary

DUP Venezuela
DUP Elec Matl Inc
DUP Enrgy Co
DUP Engr Parts NV/SA
DUP Engg Prod SA
DUP Safer Sys Inc
DUP SGP PTE
DUFE Inc
DUP Feedstocks Co
DUP Chem & Enrgy Ops
DUP DO Brasil SA
DUP Inter Amer Chem
DUP Hong Kong Ltd
DUP Iran Co.
DUP Iberica
DUP Kansai Coatings DUP Korea Ltd
DUP Korea Inc.
DUP Korea Spcl Plymr
DUP LNXD CMP
DPMC
DUP Spcl Opern Inc
DUP Norol Maint Serv
DUP Overseas Cap NV
DUP Phmsk Inc
DUP Pigmentos LTDA
DUP Polymeres SA
DUP Puerto Rico Inc
Conjet Nordic
DUP Senegal Inc
DUP Taiwan Ltd
DUP Taiwan Chem
DUP Thailand Co Ltd
DUP Per Hold
DUP Toray Pte Ltd
ENDO Labs L.L.C.
ENDO Pan Amer Corp
DUP Philippines Inc

DUP Phar Caribe Inc
DUP Phr Pnam
DUP Diagnostics Inc
DUP Med Prod Inc
DUP Photolux SA
DUP Semicndctr Prod
DUW Inc
Ecochem Prod
Envir Biocntl Intl
Freshworld Inc
Freshworld LP
Ducoa
Medal LP
Sepsys Inc
Sepsys LP
Greyhawk Sys Inc
Howson Portugal
IDAC - GMBH
Inagra
Intmt Can Inc
Intmt Can LP
KDK Auto Coatings Co
DUP Korea Ltd
LA Dominica SA DE CV
Lanxide Armor Co LP
DUP Farma Mex
DX IMG
Maxi Bensin AB
M-Cap Tech
Hec Mgmt
Mdsrb Tch Intl Inc
Mdsrb Tch LP
Minera Rosala
CLP 1990 LP
Mt Clemens Coat
Nutribasics
Nen France SARL

NEN GMBH
Niachlor
DUP Danmark
Nugreen
Nylmex
Oncogenetics Ptnr
Optcl Disc Mastering
Perceptive Sys Inc
PD GLY Ltd
PDO
POC Rsch Corp
PT Peroksida Indo
Plmb Clm Grp Inc
Plast Rcyc Alnc LP
Polyacryl Iran Corp
Quim DUP Centro
Quimica Fluor
Reactivos Minerales
Sol State Dielec Inc
S MS Transpn Co
Conjet Finland
Sply Chn Sftwr NV
Syngas
TJN DUP Inc
Tetraetilo De Mexico
Thapar DUP Spandex
DUP Fib Lim Thapar
Toyo DUP Intl Ink
TVS DUP Elec Ltd
DUP TOA Co Ltd
EKA Nobel Antil Hldg
Hrdcore DUP Cmpos
Griffin Colombia
DUP De Colombia SA
Croda Herberts Pty
Howson Australasia
Dunlena Pty Ltd

DUP Wesfarmers Pty
Rem Arms GMB
Rem Arms Can
Remington Lic Corp
The Peters Ctg Co
The Union Mtlc Ctg
Iranian Invst Corp
Irn Oil Ptcp
Irn Oil Serv
Iricon Agncy Ltd
San Jacinto Serv
Ameropa Trd & Shp
Godefroid Trd & Shp
Continental Oil S.A.
Caron Licour S.A.

PETITIONER:

Eastman Chemical Products, Inc.

PARENT:

Eastman Chemical Company

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Eastman Kodak Company

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Ford Motor Company

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

Dealership Sales Operations
Humboldt Mining
Autolatina America S.A.
Auto Alliance Int'l. Inc.
Jiangling Motors Corporation
Autoalliance Co.
Conix Belgium
Mahindra Ford India Ltd.
AAP Property Holding Co.
NEMAK S.A.
Engr. & Res. CAS
Trans-Global Ltd.
Otosan Otomobile Sanayii-Turkey
AMIN Holdings
SAMCOR
Mazda Motor Corp.
Halla Climate Control Corp.
Nascote Industries
Korea Automotive Component Corp.
Japan Climate Systems Corp.
Penstone
United Aluminum Radiator Company
Halla Electronics Corp.
Shanghai Yan Feng Auto Trim
Halla Climate Ltd.
Toledo Moulding and Die Inc.
Vitroflex S.A.
ADELA Investment Co. S.A.
ANORAD
Aries Technology, Inc. Stock
EXA Corporation
Carnegie Group, Inc.
Ceradyne
EDESA Societe Anonyme Holding
Inference Corporation
KIA Motors Mahindra & Mahindra Ltd.

Mechanical Technologies
Halla Climate Control Canada
Visteon Poland
Visteon ZEM S.A.
Visteon Technologies-LLC
PI Technology LTD
Visteon Climate Control Systems Ltd.
ARS, Inc.
Wholesale Radiator Warehouse, Inc.
The Hertz Corporation
Hertz Equipment Radiator Corporation
Big 4 Rents, Inc.
Strawn Merchandise Company, Inc.
RHG, Inc.
Phillips/Day & Maddock
California Short Term AG Rentals, Inc.
Mech Star Inc.
S & R Rental & Supplies, Inc.
Hertz International, Ltd.
Hertz Equipment Rental Intl. Ltd.
Executive Ventures, Ltd.
Hertz Claim Management Corporation
Hertz Vehicle Sales Corporation
HCM Marketing Corporation
Best Impression Copy Service, Inc.
HCM Marketing Corp.
Hertz Transporting, Inc.
Hertz System, Inc.
Hertz Local Edition Corp.
Hertz Local Edition Transporting, Inc.
Hertz Technologies, Inc.
Hertz Funding Corp.

PETITIONER:

Frito-Lay, Inc.

PARENT:

Recot, Inc. (an indirect wholly owned subsidiary of Pepsico, Inc.)

NON-WHOLLY OWNED SUBSIDIARIES:

Alpac Corporation
Recot, Inc.

PETITIONER:

G.H. Nebraska Holding Co. (formerly York Manufacturing Company)

PARENT:

Amcord, Inc. (an indirect wholly-owned subsidiary of Hanson Plc)

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

General Motors Corporation

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

Aba Motriz Financiamiento S.A. de C.V., Sociedad Financiera de Objeto Limitado, Abaco Grupo Financiero
Adela Investment Company S.A.
AeroVironment, Inc.
Aisin GM Allison Co., Ltd.
American Mobile Satellite Corporation
Applied Intelligent Systems, Inc.
Argonaut Relocation Services, L.L.C.
Autohaus am Nordring GmbH, Berlin
Avis, Inc.
Banque Opel
CAMI Automotive, Inc.
Califomia Broadcast Center, LLC

Carus Gru ndstucks-Vermietu ngsgesellschaft mbH & Co.
Object Ku no 65 KG
Carus Grundstucks-Vermietungsgesellschaft mbH & Co. Object Leo 40 KG
Centro Tecnico Herramental, S.A. de C.V.
Chevrolet Sociedad Anonima de Ahorro pare Fines Determinados
Cimflex Teknowledge
Coalition Undertaking Remedial Efforts, Inc.
Componentes Para Automotores, S.de R.L. de C.V.
Controladora Mexicana de Autopartes, S.A. de C.V.
Convesco Vehicle Sales GmbH
DMAX, Ltd. DTVI One, Inc.
DTVI Two, Inc.
Daniels/Florida Automotive Group, LLC
Dealership Liquidations, Inc.
Delphi Automotive Systems Corporation
Delta Motor Company (Pty.) Ltd.
Detroit Diesel Corporation Diavia Aire, S.A.
Diavia Brasil – Ar Condicionado Ltda.
DIRECTV Japan Kabushiki Kaisha (aka DIRECTV Japan, Inc.)
EDESA Societe Anonyme Holding
ELAZ-GM Corporation
EMD Leasing Corporation
EPEC S.A. Electrotecnica Famar S.A.C.I.I.E.
Fabrica Nacional De Autobuses, C.A.
Financial Network Alliance, L.L.P.
First Portland Technology Corp.
Freevale Limited
GM Credit AB
GM Nigeria Limited
GM Ovonic L.L.C.
GM-Saab Communication GmbH
GMAC-20th Century Finance Corporation Ltd.
GMAC de Argentina S.A.

G.M.A.C. Financiera de Colombia S.A. Compania de Financiamiento Comercial
GMAC Finansiering A/S
Genasys L.C.
General Motors Egypt, S.A.E.
General Motors Kenya Limited
Genie Mecanique Zairois, S.A.R.L.
General Scanning, Inc.
Globecomm Systems
Goldman Agent Private Limited
HRL Laboratories LLC
Hughes Airport Development Corporation Sdn Bhd
Hughes Ispat Limited
Hughes-Kenwood RDSS, Inc.
Hughes Olivetti Telecom, N.V.
Hughes Software Systems Private Limited
1. K. Coach Co., Ltd.
IBC Vehicles (Distribution) Limited
IBC Vehicles Limited
ICO Global Communications (Holdings) Limited
ISF Internationale Schule Frankfurt Geschaeftsfuehrungs GmbH
ISF Internationale Schule Frankfurt GmbH & Co. KG
ITT Automotive Electrical Systems, Inc.
Indus, Inc.
Industries Mecaniques Maghrebines, S.A.
Isuzu-General Motors Australia Limited
Isuzu Motors Limited
Jinbei GM Automotive Co. Ltd.
KDS Company, Ltd.
Katcon, S.A. de C.V.
Korea Technology Bank
LDG Acquisition Corporation Locomotive Leasing Partners, L.L.C.
Metal Casting Technology, Inc.
NetSat Express, Inc. New Cure, Inc.
New United Motor Manufacturing, Inc.

New Venture Gear, Inc.
Nippon Avionics Co., Ltd.
Noteco Comercio e Participacos Ltda.
Olympia Capital ASA
Omnibus BB Transportes, S.A.
On:Line Finance Holdings Limited
Opel Bank, S.A.
OPEL Bankgesellschaft m. b. H. Opel-Haendler Versicherungsdienst GmbH
OPEL Leasinggesellschaft m.b.H.
Opel Restrukturierungsgesellschaft mbH
Opel Wohnbau GmbH
P. T. GMAC Lippo Finance
PT Hughes Network Systems
P. T. Mesin Isuzu Indonesia
PDES, Inc.
PT. Pasifik Satelit Nusantara
Packard CTA Pty. Ltd.
PanAmSat Africa (Proprietary) Ltd.
PanAmSat Asia Carrier Services, Inc.
PanAmSat Asia Pty. Ltd.
PanAmSat Capital Corporation
PanAmSat Carrier Services, Inc.
PanAmSat Communications Carrier Services
PanAmSat Communication Services, Inc.
PanAmSat Corporation
PanAmSat Europe Limited
PanAmSat FSC Incorporated
PanAmSat India, Inc.
PanAmSat International Employment, Inc.
PanAmSat International Holdings, Inc.
PanAmSat International Systems, Inc.
PanAmSat Licensee Corp.
PanAmSat Mexico, Inc.
Pan Asia Technicai Automotive Center Company, Ltd.
ProSTEP GmbH

Qual-Efffic Services, Inc.
RFC Construction Funding Corp.
Radiadores Richard S.A.
Residential Alliance, LLC
Robotic Vision Systems, Inc.
Ruedas de Aluminio, C.A.
Saab Automobile AB
Santa Guarantor, Ltd.
Satelitron S.A. de C.V.
Saturn Retail Enterprises, Inc.
Shanghai General Motors Corporation Ltd.
Shanghai Hughes Network Systems
Smith/Florida Group, LLC
Sociedad de Comercializacion Internacional Colmotores S.A.
Southern Satellite Licensee Corporation
Structured Asset Notes Transactions, Ltd.
Structured Asset Notes Transactions 11, Ltd.
Subaru-Isuzu Automotive, Inc.
SurFin Ltd.
Suzuki Motor Corporation
USHI, Inc. Ukrainian Wave Ltd.
Universal Motors Israel Ltd.
Volvo Trucks North America, Inc.
Corral, L.P.
G. & F. Company
GM-ARA Industrial Cleaning
Galaxy Latin America
Hughes – Pareto Research Partnership
Low Emission Paint Research and Development Partnership
Low Emissions Technologies Research and Development Partnership
Medical Science Partners 11
SJ & LA Associates
Supercomputer Automotive Applications Partnership

Technologies for Information & Entertainment 111, L.P.
United States Automotive Materials Partnership Verinet
Auto/Oil Quality Improvement Research Program
Automotive Polymer-Based Companies Joint Venture and Development Partnership (aka Automotive Composites Consortium)
CAD/CAM Consortium
Crash Avoidance Metrics Partnerships
Detroit Investment Fund, L.P.
Electrical Wiring Component Applications Partnership
Environmental Research Consortium
GM Mobile Communications Systems
High Speed Serial Data Communications Research and Development Consortium
Low Emissions Technologies Research and Development Partnership
National Automated Highway Systems Consortium
Natural Gas Vehicles Research Partnership
Occupant Safety Research Partnership
U.S. Council for Automotive Research
United States Advanced Battery Consortium
Vehicle Recycling Consortium

PETITIONER:

Gerber Products Company (formerly Gerber Food Products)

PARENT:

Gerber Holding Company (an indirect wholly-owned subsidiary of Novartis, AG)

NON-WHOLLY OWNED SUBSIDIARIES:

Alima-Gerber S.A
Promotora de Alimentos Infantiles S.A. de C.V.
Productyos Gerber S.A. de C.V.

Comerqrosa S.A. de C.V.
Novartis Nutrition de Venezuela

PETITIONER:

Hanson Aggregates West, Inc. (formerly Gifford-Hill & Company, Inc.)

PARENT:

Hanson Building Materials America, Inc. (an indirect wholly-owned subsidiary of Hanson Plc)

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Hecla Mining Co.

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

ConSil Corp.
Minera ConSil S.A. de C.V.
The Rosebud Mining Company, L.L.C.
Abot Mining Company

PETITIONER:

Herman Miller, Inc.

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Hewlett-Packard Company

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

Hewlett-Packard Australia Ltd.
Foppingadreef Investments Ltd

P.T. Hewlett-Packard Berca Servisindo
Hugin Expert A/S
Hewlett-Packard Korea Ltd.
ImagineCard LLC
Hua Pu Information Technology Ltd.
PuTian OME Systems Integration Co. Ltd.
Hilco Technologies Inc.
Microelectronics Technology Inc.
Interspeed Ltd.
Cascade Microtech Inc.
Quinton Instruments
QIC Holding Corporation
I-state Corporation
Shanghai Huatek Software Engineering Co., Ltd.
Microelectrics and Computer Technology Group
Candescent Technology Corporation
Microelectronics Technology Inc.
The Open Group L.L.C.
Manufacturing & Consulting Services
H.R.B. Associates L.P.Hewlett-Packard International B.V.
MicroUnity
Conductus Inc.
Spatial Technologies
Spectragraphics
Crossroads Systems, Inc.
Discovery Partners International, Inc.
Caliper Technologies Corporation
Geoworks
Primix Solutions formerly One Wave Inc.
Opportunity Capital Corporation

PETITIONER:

Honeywell, Inc.

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

Beijing Honeywell Energy Saving Equipment Co., Ltd.
Tata Honeywell Limited
Yamatake Corporation
Yamatake & Co., Ltd.
Tsishin Co., Ltd.
Shanghai Yamatake-SIC Building Automation Co., Ltd.Beijing Yamatake-SIC Control Systems Co., Ltd.
Shanghai Yamatake Jinshan Control Instruments Co., Ltd.
Yamatake-Honeywell (Thailand) Co., Ltd.
PT. Yamatake Berca Indonesia
Data Instruments Critical Fluid Group LLC
Stamping Support Systems, Inc.
Data Instruments France S.A.
GE/Micro Switch Control Inc.
Saudi Arabian Tetra Tech Limited
Global Panels Ltd. Elm Electronic Controls Limited
Intalogik Limited
Embrasid S.A.
Sinopec Honeywell (Tianjin) Limited
ESCO Hungary Rt.
Honeywell India Limited
Sinted S.p.A.
NEC-Honeywell Space Systems Ltd.
Berkat Honeywell SDN.BHD.
Ineco S.r.l.
Honeywell Kuwait K.S.C.
Honeywell & Co. Oman L.L.C.
Honeywell Otomasyon ve Kontrol Sistemleri Sanayi ve Ticaret A.S.
Turnkiek Process Control B.V.
Cara C'Air B.V.
Nord Ventilasjon A/S
Honeywell ESCO Polska
Honeywell Turki-Arabia Limited

Honeywell Rotary Pte. Ltd.
Satronic GmbH
Tecuria Engineering AG

PETITIONER:

Hormel Foods Corporation (formerly George A. Hormel and Company)

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Hygrade Food Products

PARENT:

Sara Lee Corporation

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Illinois Tool Works, Inc. (successor to Signode Corporation)

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

ITW-Imaden Industrie E Comercio Ltda.
ITW-Jeju Industries Private Limited
ITW-Signode India Limited
Japit Inc.
Kormag Industries e Comercio Ltda.
Lys Fusion Polan Sp.z.o.o.
Mima Filsm SCA
Nifco Hi-Cone Leasing Company Limited
PT Cyklop Indo Utama
Pack-Band Hagen GmbH
Packaging Leasing Systems Inc.

Packaging Systems, L.L.C.
Richmond Systempak Limited
Rivex S.A.
Sam Jung Signode Inc.
Serim s.r.l.
Shanghai ITW Plastic & Metal Company Limited
Signode Brasileria S.A.
Signode Ireland Limited
Signode Packaging Systems Limited Societe de Rectification et de Decolletage SARL
Accu-Lub manufacturing GmbH
BSH-TM GmbH
CS Packaging (Malaysia) Sdn Bhd
CS Packaging Corporation Ltd.
CS Packaging Corporation Ltd.
CS Packaging Corporation Pte. Ltd.
CS Packaging Corporation Pte. Ltd.
CS Packaging Corporation (Shanghai) Ltd.
Envases Multipac, S.A. de C.V.
H.A. Springer Far East Pte. Ltd.
Hylec Eletro Gibi (UK) Ltd.
IMSA ITW, S.A. de C.V.
Inmobiliaria Cit, S.a. de C.V.
Ispra-Flex S.p.A.
ITW-Canguru Rotulos Ltda.
ITW Dynatec Limited
ITW Dynatec Singapore Pte. Ltd.
ITW Dynatec Thailand Ltd.

PETITIONER:

Ingersoll Rand (successor to Clark Equipment Co.)

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:
International Paper Company
PARENT:
None
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Kal Kan, Inc.
PARENT:
Mars, Incorporated
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Kimberly-Clark Corporation
PARENT:
None
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Kimberly-Clark Tissue Company (formerly Scott Paper Company)
PARENT:
Kimberly Clark Corporation
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Lamb-Weston, Inc.
PARENT:
None
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:

LifeSavers, Inc.

PARENT:

Nabisco Holdings Corp.
Nabisco Group Holdings Corp.

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Longview Fiber Company

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Mars, Inc.

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

McGraw-Edison Co. (Area Lighting, Bussman and Halo Lighting Divisions and successor to Wagner Electric Sales Corporation)

PARENT:

Cooper Industries, Inc.

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Mead Corporation (also known as Zellerbach Paper)

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Mountain Safety Research
PARENT:
Recreational Equipment, Inc.
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Murray Pacific Corporation
PARENT:
None
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Nabisco Holdings Corp. (Petitioner formerly owned Canada Dry Corporation and Sunkist Soft Drinks, Inc. both plaintiffs below and has retained their rights in this action)
PARENT:
Nabisco Group Holdings Corp.
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Nabisco, Inc.
PARENT:
Nabisco Group Holdings Corp.
Nabisco Holdings Corp.
NON-WHOLLY OWNED SUBSIDIARIES:
West Indies Yeast Co. Ltd.
Nabisco/Cetus Food Biotechnology Research Partnership

Nabisco Arabia Co., Ltd.
Landers Centro American Fabricantes de Molinos Marca "Corona SA de CV (in liquidation)
Nabisco International M.E./Africa LLC
Nabisco Iberia, S.L.
Yili-Nabisco Biscuit Food Co. Ltd.
Nabisco de Nicaragua S.A.
Gelatina Ecuatoriana S.A.
Establecimiento Modela Terrabusi, S.A.
Nabisco South Africa (proprietary) Ltd.
PT Nabisco Foods

PETITIONER:
Nicholson Manufacturing Co.
PARENT:
Nicholson Industries, Inc.
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Noel Corporation (d/b/a Noel Canning Corporation)
PARENT:
None
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Northern Commericial Company
PARENT:
Skinner Corporation
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Northwest Alloys, Inc.

PARENT:

Alcoa Securities, Inc. (an indirect wholly owned subsidiary of ALCOA, Inc.)

NON-WHOLLY OWNED SUBSIDIARIES:

None

FETITIONER:

O'Brien International

PARENT:

Earth and Ocean Sports, Inc.

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Outboard Marine Corporation

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Owens-Corning (formerly Owens-Corning Fiberglass Corp.)

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Pepsi Cola Bottling Company of Everett, Inc.

PARENT:

Western Bottling Company, Inc. (a wholly owned subsidiary of Pepsico, Inc.)

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

PepsiCo, Inc. (Petitioner also formerly owned Pizza Hut of America, Inc. and Taco Bell Corporation, both plaintiffs below and retains their rights in this action)

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

American Business Computers Corp.
Laurel Packaging, Inc.
Pepsi Cola Allied Bottlers, Inc.
Pepsi Cola Bottling of Bend
Pepsi Cola Bottling of Northern California
Pepsi Cola Bottling of Roseburg
Pepsi Cola General Bottlers, Inc.
Bebidas Purificadas De La Frontera, S.A.
Bebidas Purificadas de Quintana Roo, SA de CV
Bebidas Purificadas del Sureste, Sa de CV
Beijing Pepsi Cola Beverage Company Ltd.
Belpak
Bienes Raices Metropolitanos, SA de CV
Blanchard, S.A.
Britvic Holdings Limited
Buenos Aires Embotelladora S.A.
Capital Mineral Water and Refreshment Corp.
Central de La Industira Esoorpion Sa De CV
Changchun Pepsi Cola Beverage Company
Chipima Sociedade De Productos Alimentares SA
Chongging Hua Mel Food & Beverage Co., Ltd.
Chongging Tianfu-Pepsi Beverage Co., Ltd.
Chongging Tianfu Yulong Foodstuff and Beverage Co.
Chupa Cjups Comercial de Mexico, S.A. de C.V.
Compania de Bebidas PepsiCo, S.A.
Compania Embotelladora Argentina, S.A.I.C.
Constar Ambalai Sanayi Ve Ticaret AS
Corina Snacks
Distribuidora Garci-Crespo Sa de CV

Duo Beverages Huizhou Co. Ltd.
E. Wedel S.
Embotelladora Agral de la Laguna, S.A. de C.V.
Embotelladora Agral Regiomontana, S.A. de C.V.
Embotelladora Buen Aqua, S.A. de C.V.
Embotelladora Chile S.A.
Embotelladores Mexicanos de Pepsi-Cola S.A. de C.V.
Empaques Constar, SA de CV
Empaques Sewell, SA de CV
Encorp Atlantic, Inc.
Equipos para Embotelladoras y Cevecerias, S.A. de CV
Equipos Deportes Exclusivas, S.A. de CV
Evercrisp Snack Productos de Chile S.A.
Finanzas Corporativas, S.A. de C.V.
Fomentadora Urbana Metroplitana SA de CV
Frito Lay Colombia Ltda
Fruko Mesrubat Sanayi A.S. Granja Buenagua, SA de CV
Grupo Embotellador de Meico, SA de CV
Guangzhou Flavours Development Corporation
Guangzhou Hua Chang Toy Co. Ltd.
Inmobillaria Guesa S.A. de CV
Inversiones PFI Chile Litada
Kirin-Tropicana, Inc.
Kyle Receivables Ltd.
Latin American Holdings Ltd.
L'Igloo, S.A.
New Age Beverages Investments Limited
Ole Springs
Orion Frito-Lay Corporation
P.T. Indofood Frito-Lay Corp.
P.T. Pepsi-Cola IndoBeverage
Pepsi-Cola (Bahamas) Bottling Company
Pepsi-Cola Bottlers New Zealand
Pepsi-Cola Nepal Pvt. Limited
Pepsi-Cola Service Ve Dagitim

Pepsi Foods Ltd.
PepsiCo Comercial Exportadora
PepsiCo Espana Inversiones S.L.
PepsiCo Ventas Andalucia. S.A.
Pet-Iberia. S.L.
President Pepsi Food Corporation
Procesos Plasticos, SA de CV
Productos Industrialzados Saltillo, S.A.
Productos S.A.S.C.V.
Productos SAS Management BV
Productos Victyoria S.A. De C.V.
Promotora de Embotelladoras, SA de CV
Radenska
S.V.E. (Hungary) Trading and Manufacturing Ltd.
Saudi Snack Foods Company Limited
Savoy Brands Peru, C.A.
Serm Suk Public Company Limited
Servicios Corporativos GEMEX, SA de CV
Seven-Up Andino S.A.
Seven-Up Concesiones
Shanghai Pepsi-Cola Beverage Company Ltd.
Shenzhen Pepsi-Cola Beverage Co. Ltd.
Sichuan Pepsi-Cola Beverage Co. Lt.
Sika Silk Company Limited
Simba
Snack Ventures Europe SCA
Sociedad Productora de Refrescos y Sabores, C.A.
Special Edition Beverages Limited
Sportmex International, S.A. de C.V.
Tianjin Pepsi-Cola Beverage Co. Ltd.
Tropicana China Investments Ltd.
Twinpack Atlantic Inc.
Ukranian Development Corp.
United Foods Company S.A.
United Soft Drinks Limited
Zrodto Priewy Sp.z.o.o.

PETITIONER:
Polaroid Corporation
PARENT:
None
NON-WHOLLY OWNED SUBSIDIARIES:
Pactide Corporation
Polaroid Shanghai J.V.

PETITIONER:
Quinton Instrument Company
PARENT:
QIC Holding Corporation
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
R.J. Reynolds Tobacco Co.
PARENT:
R.J. Reynolds Tobacco Holding Co.
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
R.J.R. Foods, Inc. (now Del Monte Frozen Foods, Inc.)
PARENT:
Del Monte Foods Company
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Recreational Equipment, Inc.
PARENT:
None
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:

Remington Arms

PARENT:

E.I. du Pont de Nemours and Company, Inc.

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Reynolds Metals Company

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

Pechiney Reynolds Quebec, Inc.
Reycan, Inc.
Alumineris de Becancour, Inc.
Aroaima Bauxite Company, Ltd.
Aroaima Mining Company, Inc.
Reymit Aluminum, S.A.
Aluminium Oxid Gemeinschaft Stade
Aluminium Oxid Stade GmbH
Reynolds Europe Recycling S.p.A.
Reynosud Die Manufacturing Company Private Limited
Boddington Housing Pty., Ltd.
Worsley Alumina Pty., Ltd.
Manicouagan Power Company
Latas de Aluminio, S.A. LATASA
Latas de Aluminio do Nordeste, S.A.
Matapu Sociedada de Mineracao Ltda
Aluminio Reynolds, Santo Domingo, S.A.
Ruedas de Aluminio C.A.
Reynolds Chile, S.A.
Reynolds Latas de Aluminio Argentina, S.A.
Reynolds Latasa Uruguay Trading, S.A.
Hamburger Aluminium-Werk, GmbH
Aluminum Marketing Company Limited

United Arab Can Manufacturing Company, Ltd.
Bohai Aluminum Industries, Ltd.
M&R Automotive Products, Inc.
Deutsche Aluminium Verpackung Recycling GmbH
Sayanal
Volta aluminum Company, Limited
Aluminium S,melter Company of Nigeria, Ltd.
Egyptian Aluminium Products Company

PETITIONER:

Sandvik Special Metals Corporation

PARENT:

Sandvik, Inc.

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Seattle FilmWorks, Inc. (formerly American Passage Marketing)

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Seawest Industries, Inc.

PARENT:

Trident Seafoods Company

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Shields Bag & Printing Company

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Shell Oil Company

PARENT:

Royal Dutch Petroleum Company
Shell Transport and Trading Company

NON-WHOLLY OWNED SUBSIDIARIES:

AeraEuergyLLC
Altura Energy Ltd.
Apache Corporation
Belridge Farms & Pacing LLC
Belridge Packing Services Co.
Catalyst Recovery Canada Ltd.
Catalyst Recovery Europe S.A
Catalyst Recovery of Louisiana, Inc.
Catalyst Technology Europe Limited
Catalyst Technology Services, Inc.
Catalyst Technology, Inc.
Chemical Research &; Licensing Company
Columbia LNG Corporation
Cosoricio Pecten, S.A. de C.V.
Coral Eneergy Resources Services Company
Coral Energy Resources, L.P.
Coral Gas Marketing Company
Coral GP Company
Coral Gas Marketing Company
Coral GP Company
Coral Power L.L.C.
Coral Redwood L.L.C.
Coral Structuring, L.L.C.
Cortez Capital Corporation
Cortez Pipeline Company
CRI Asia Pacific Pte. Ltd.
CRI Catalyst Company
CRI Catalyst Company Belgium N.V.

CRI Catalyst Company Europoe Limited
CRI Catalyst Company U.K. Limited
CRI Europe S.A.
Cortez Capital Corporatoin
CRI Fine Chemicals Inc.
CRI Germany GmbH
CRI International, Inc.
CRI Investment Corporation
CRI Metal Products, Inc.
CRI Real Estate, Inc.
CRI Sales and Services Inc.
CRI Zeolites Inc.
Criterion Catalyst Company
Criterion Catalyst Company – Virgin Islands Inc.
Criterion Catalys Company L.P.
Cross Timbers Oil Company
CS Metals of Louisiana LLC
EDI-GP, L.L.C.
CRI Germany GmbH
Equilon Enterprises LLC
Equiva Trading International, LLC
Explorer Pipeline Company
Founders National Bank of Los Angeles
Fractionation Rfesearch, Inc.
GRAVCAP, Inc.
Heat Transfer Research, Inc.
Inland Corporation
Inverness Prospect Partnership
Loop, Inc.
Lucky Chance Mining Company, Inc.
Mercury Energy L.L.C.
Midstream Capital Corp.
Moitiva Enterprises LLC
Noble Assurance Company
NPC Services, Inc. as of 6/15/99
Oil Companies Institute for Marine Pollution
Company

Oil Insurance Limited
Pecten Cameroon Company
Pecten Do Brasil Servicos De Petroleo, LTDA
Pecten Export Corporation Ltd.
PICO LIMITED
Plains Resources, Inc.
Plantation Holdings LLC
Plumbing Claims Group, Inc.
PRISM Technologies Limited
PrismTech Corporation
Royal Landmark Structures, L.L.C.
Saudi Petrochemical Company
Services Integration Group, L.P.
Services Integration Marketing, L.L.C.
Services Integration Resources, L.L.C.
Shell CO2 Company, Ltd.
Shell Louisiana Onshore Properties Inc.
Shell LSO Property Company
Shell Offshore Services Company
Shell Oil & Gas Investment Limited Partnership
Shell Philippines LLC
Shell Assets Company
Shell Refining Holding Company
Shell Royalties Investment Company

PETITIONER:

Square D Company

PARENT:

Schneider Electric Holdings, Inc.

NON-WHOLLY OWNED SUBSIDIARIES:

Palatine Hills Leasing, Inc.
Coaltech No. 1
Haydenvale PTE, Ltd.
Square D Saudi Arabia Ltd.
Schneider Canada Inc.
Schneider Mexico S.A. de C.V.

PETITIONER:
The Strohs Companies, Inc. (successor to G. Heileman Brewing Company)
PARENT:
None
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Sun Sportswear, Inc.
PARENT:
Brazos Sportswear LLC
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Tektronix, Inc.
PARENT:
None
NON-WHOLLY OWNED SUBSIDIARIES:
MaxTek Components Corporation
Sony/Tektronix Corporation
Merix Corporation
Tektronix (India) Limited

PETITIONER:
Thaw Corporation
PARENT:
Recretional Equipment, Inc.
NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Thermo King Corporation
PARENT:
Ingersoll Rand

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Tillamook County Creamery Assoc.

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

UDV North America, Inc. (formerly Heublein, Inc. and successor to Heublein Wines (formerly United Vintners, Inc.))

PARENT:

Heublein Holdings Corporation (an indirect wholly-owned subsidiary of Diageo PLC)

NON-WHOLLY OWNED SUBSIDIARIES:

Austin Nichols do Brasil, Inc.
Boulevard Distillers & Importers, Inc.
Boulevard Expert Sales, Inc.
Heublein Industria e Comercio Limitada
Heublein (Japan) Ltd.

PETITIONER:

Uncle Bens, Inc.

PARENT:

Mars, Inc.

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

USX Corporation

PARENT:

None

NON-WHOLLY OWNED SUBSIDIARIES:

Adda Investment Company Say
Athlone Prospecting and Development Corporation Limited
Chrome Deposit Corporation
Double Eagle Steel Coating Company
Feralloy Processing Co.
La Pointe Iron Company
Olympic Laser Processing
USS-Posco Industries
Tilden Iron Mining Company
Transtar, Inc.
Bessemer and Lake Erie Railroad Company
Birmingham Southern Railroad Company
Cuyahoga Dock, Inc.
Duluth, Missabe and Iron Range Railway Company
Elgin, Joliet and Eastern Railway Company
Fairfield Southern Company, Inc.
The Lake Terminal Railroad Company
McKeesport Connecting Railroad Company
The Pittsburgh & Conneaut Dock Company Mon Valley Railway Company
Tracks Traffic and Management Services, Inc.
Transail, Inc.
Union Railroad Company
USS Great Lakes Fleet, Inc.
Warrior & Gulf Navigation Company
Mobile River Terminal Company
Acero Prime, S.R.L. de C.V.
Pro-Tec Coating Company
Pro-Tec Coating Company, Inc.
USS/Kobe Steel Company
USS-Kobe International Sales Corporation
Delta Tubular Processing
VSZ U.S. Steel, s.r.o.
UEC Sail Information Technology, Ltd.
USX Participacoes Ltda.

Merinds Mineracao
Mineracao Carajas, Ltda
Mineracao Maraba, Ltda
Mineracao Xingu, Ltda
Torremco-Sociedade de Vanegaco E Comercia Ltda.
Worthington Speciality Processing

PETITIONER:

Welch's (formerly Welch Foods, Inc.)

PARENT:

National Grape Cooperative Assoc., Inc.

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Western Bottling Co., Inc.

PARENT:

PepsiCo, Inc.

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Western Gear Machinery Corp.

PARENT:

Bucyus International, Inc. (a wholly owned subsidiary of American Industrial Partners Acquisition Company, LLC)

NON-WHOLLY OWNED SUBSIDIARIES:

None

PETITIONER:

Westinghouse Electric Company (formerly Westinghouse Electric Corporation)

PARENT:

British Nuclear Fuels Company

NON-WHOLLY OWNED SUBSIDIARIES:
None

PETITIONER:
Xerox Corporation
PARENT:
None
NON-WHOLLY OWNED SUBSIDIARIES:
1247461 Ontario Inc.
ChannelBind Corporation
Chapman Instruments, Inc.
Docucentro S.A.
Document Sciences Corporation
Documentum, Inc.
dpiX, Inc.
FairCopy Services Inc.
Image Sciences, Inc.
InConcert, Inc.
InXight Software, Inc.
Katun Corporation
Microlytics, Inc.
Opto Generic Devices, Inc.
Placeware, Inc.
Xerox de Venezuela, C.A.Venezuela
ScanSoft, Inc. (formerly Visioneer, Inc.) Delaware
SCC Burton Corporation
Signature Corporation
Telesensory Corporation
The Genmoora Corporation
UltraFine Powder Technology, Inc.
Verbex Voice Systems, Inc.
Xerox Canada Inc.
Xerox (Barbados) SRL
Xerox Capital de Mexico, S.A. de C.V.
Xerox Canada Ltd.
Xerox Capital, LLC
Xerox Shanghai Limited

Zikom Xerox Document Communications Systems Ltd Wuhan
Investissements Xerographiques Marocains S.A.
Reprographics Egypt LimitedEgypt
Xerox Egypt S.A.E.Egypt
Xerox Finance Leasing S.A.E.
Xerox Emirates Limited Liability Company
Xerox Maroc S.A.Morocco
Xerox Products LimitedBermuda
Xerox de El Salvador, S.A. de C.V.El Salvador
Xerox International Partners
Xerox Canada Realty Inc.Ontario
Xerox Capital (Europe) plc
RRXH LimitedUnited Kingdom
Continua Limited
Fuji Xerox Co., Ltd.
Aichi Xerox Co., Ltd.Japan
Aichi-Higashi Xerox Co., Ltd.
Akita Xerox Co., Ltd.Japan
Assist V Co., Ltd.Japan
Chiba Xerox Co., Ltd.Japan
Philipine Fuji Xerox Corporation
Taiwan Fuji Xerox Corporation
Taiwan Fuji Xerox System Service Corporation
Thai Fuji Xerox Co., Ltd.
Fuji System Brain Co. Ltd.Japan
Fuji Xerox Korea Co. Ltd.Korea
Fuji Xerox Korea Information Systems Co., Ltd.
Fukui Xerox Co. Ltd.Japan
Fukuoka Xerox Co., Ltd.Japan
Fukushima Xerox Co., Ltd.Japan
Gunma Xerox Co., Ltd.Japan
Hiroshima Xerox Co., Ltd.Japan
Hokkaido Xerox Co., Ltd.Japan
Hokuriku Xerox Co., Ltd.Japan
Hyogo Xerox Co., Ltd.Japan
Japan Image Communications Co., Ltd.

Kagoshima Xerox Co., Ltd.Japan
Kanagawa Xerox Co., Ltd.Japan
Kita Kyushu Xerox Co., Ltd.Japan
Kumamoto Xerox Co., Ltd.Japan
Kyoto Xerox Co., Ltd.Japan
MCM Asia Pacific Co., Ltd.Japan
M-I-C Co., Ltd.
Mie Xerox Co., Ltd.Japan
Miyagi Network Inc.Japan
Miyagi Xerox Co., Ltd.Japan
Nagano Xerox Co., Ltd.Japan
Nagasaki Xerox Co., Ltd.Japan
Niigata Xerox Co., Ltd.Japan
NTT Learning Systems Corp.Japan
Okayama Xerox Co., Ltd.Japan
Oita Xerox Co. Ltd.Japan
Okinawa Xerox Co. Ltd.Japan
Osaka Xerox Co., Ltd.Japan
Protex Co. Ltd.
Saitama Xerox Co., Ltd.Japan
Shikoku Xerox Co., Ltd.Japan
Shizuoka Xerox Co., Ltd.Japan
Sogetsu Art Planning Co., Ltd.
Tama Xerox Co., Ltd.Japan Technol Co. Ltd.
Tochigi Xerox Co., Ltd.Japan
Tokyo Xerox Co., Ltd.Japan
Wakayama Xerox Co. Ltd.Japan
Xerox High-Technology Company of Shenzhen Ltd.
Xoo GraphiX Co., Ltd.Japan
Yamagata Xerox Co., Ltd.Japan
GS Xerox Electronics
Modi Xerox Limited
Modi Xerox Financial Services Limited
Multilingual Technology LimitedUnited Kingdom
Alpha Burotic
Alpha Center NV
Burotic Business S.A.Belgium

Burotic 2000 S.A.Belgium
Business Office Products S.A.
D & O Partners SABelgium
Euro Burotic S.A.Belgium
Eugene Hoffman Office Supplies SA
Kantoor Automatisering Limburg
Kortrijk Document Center NV
Nouveau Centre Bureautique SA
Office Solution NVBelgium
Offitech NV The Limited Liability Company Xerox (Ukraine) Limited
Amanuens Document ABSweden
Documentura AB
Documentus AB
M F Tharold AB
RXP Forsäljning i Lulea ABSweden
XPI Malme AB
Almeria
Arguelles
Asturias
Cadiz
Caceres
Castellana
Castellon
Castilla Norte
Cia. Espanola Reprografia y Servicios SA
Ciudad Lineal
Cuzco
De Avila Y Segovia Spain
De Bilbao
De Gerona
De Tenerife
Del Ebro
Guipúzcoa
Henares
Jaen
Les Corts

Llobregat
Los Llanos
Madrid-Sur
Malaga
Malaka
Retiro
Rias Bajas
Salamanca
Valladolid
Vizcaya
Xerox Renting S.A.U.Spain
Copygraff S.A.
Documex SA
Docusys SA
Xerox (Ireland) Limited
Xerox Modicorp Ltd
Xerox (Nigeria) Limited
Xerox H.S. (Nigeria) LimitedNigeria
CEMEX – Equipamentos e Servicos, Limitada
Xecompex – Equipamentos e Servicos, SA
Xenax – Equipamentos de e Servicos, Limitada
Xesequipa – Equipamentos e Servicos, SA
Xerox South Africa (Proprietary) Limited
University Document Management Services (Proprietary) Limited South Africa
Agix Sarl
Aquitaine Docutique Systemes
Ardennes Marne BureatiqueFrance
Axes Bureautiques SystemesFrance
BSC Arve
Bureautique 64
Bureautique 66
Burobail S.A.
Burocom 42
Burofinance S.A.
C K Bureautique
Centre Bureautique 49France
Centre Bureautique Auvergne

Centre Bureautique Informatique
Competence BureautiqueFrance
DOCUSYS SA
Espace BureautiqueFrance
Espace DocumentFrance
Franche Comte BureautiqueFrance
L.A. Bureautique
Office de Transformation Papetiere S.N.C.
Repro Partner
SRE Societe de Reprographie Electronique
Xeroboutique
Coles Office Products Limited
Text-Comm Limited United Kingdom
The Document House Limited
Xeretec Limited
Xerox West Africa Limited
Astor Administracao de Bens e Participacoes
Xerox Trinidad Limited
XESystems, Inc.

Supreme Court, U.S.
FILED
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No. 99-38

In the

SUPREME COURT OF THE UNITED STATES

BUFFELEN WOODWORKING CO., *et al.*,
Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Washington

RESPONDENT'S BRIEF IN OPPOSITION

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State of Washington
DONALD F. COFER*
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JURISDICTION

This Court lacks jurisdiction over the petition because the decision of the Supreme Court of Washington is not a "final judgment or decree" within the meaning of 28 U.S.C. § 1257(a). We discuss this jurisdictional issue at page 11, *infra*.

STATEMENT

We begin with a brief description of the taxes at issue in this case and prior litigation concerning those taxes. We will then discuss the complex procedural history of this case.

I. Washington's Taxes on Extracting, Manufacturing, and Selling.

This case concerns Washington's business and occupation (B&O) taxes on the activities of extracting, manufacturing, and selling. The extracting and manufacturing taxes are imposed on the activities of extracting or manufacturing in Washington. The measure of both taxes is the "value of the products" extracted or manufactured in Washington. Wash. Rev. Code §§ 82.04.230, .240. B&O taxes also are imposed on the activity of selling, either at wholesale or retail. The measure of the selling taxes is the "gross proceeds of sales" in Washington. Wash. Rev. Code §§ 82.04.250, .270.

It is important to understand that the extracting, manufacturing, and selling B&O taxes are imposed only when those activities take place in Washington. For example, a business located in Washington does not pay any manufacturing B&O tax with respect to products it manufactures in another state or any selling B&O tax with respect to products it sells in another state. Washington does not have jurisdiction to tax extracting, manufacturing, or selling activities that take place in other states. In this respect, the B&O taxes differ from net income taxes that include within their measure all of a business's net income from every jurisdiction derived from every business activity.

The B&O tax system now includes the two-way system of credits suggested by this Court in *Tyler Pipe Indus., Inc. v. Washington State Dep't of Rev.*, 483 U.S. 232, 246 (1987). Under the two-way credit system, all persons engaged in extracting or manufacturing activities in Washington must pay an extracting or manufacturing B&O tax. All persons engaged in selling in Washington must pay a retailing or wholesaling B&O tax.

Under the two-way credit mechanism, both local and interstate businesses are entitled to a tax credit against Washington's selling tax. The Washington B&O tax imposed on the sale of a product may be reduced by the amount of any extracting or manufacturing tax paid to Washington or another jurisdiction on the activities of extracting or manufacturing the product. Wash. Rev. Code § 82.04.440(2).

A credit also is available for Washington extractors or manufacturers selling in interstate commerce. This is a credit against Washington's extracting or manufacturing tax. The Washington tax imposed on the activities of extracting or manufacturing a product may be reduced by the amount of any selling tax paid to another jurisdiction on the activity of selling the product. This credit is available only for selling taxes paid to jurisdictions other than Washington. Wash. Rev. Code § 82.04.440(4).[1]

The two-way credit system ensures that interstate and local businesses will bear the same tax burden on their extracting, manufacturing, and selling activities.

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[1] Petitioners cite subsection (2) as the statutory basis for "Internal Credits" for local commerce and subsection (4) as the statutory basis for "External Credits" for interstate commerce. Pet. 6-7. To the extent those statements suggest that the credits authorized by subsection (2) are limited to local commerce or that the credits authorized by subsection (4) are the only ones available to interstate commerce, they are inaccurate. Subsection (2) also grants credits to interstate businesses. Petitioners' descriptions of the comparative "burdens" associated with "Internal Credits" and "External Credits" also are misleading. We discuss this point at page 17-18, *infra*.

II. Prior Litigation Over the Extracting, Manufacturing, and Selling B&O Taxes.

A. *Tyler Pipe.*

Beginning in 1984, taxpayers brought over 300 actions challenging the extracting, manufacturing, and selling B&O taxes on Commerce Clause grounds. Many but not all of the current petitioners were among a group of 71 appellants in *Tyler Pipe*, 483 U.S. 232 (1987). At that time, the B&O tax system did not have the current two-way credit system. Instead, there was a "multiple activities exemption," which provided that "[p]ersons taxable under [the Washington retailing or wholesaling taxes] shall not be taxable under [the Washington extracting or manufacturing taxes] with respect to extracting or manufacturing of the products so sold." Wash. Rev. Code § 82.04.440(2) (1984). The former multiple activities exemption thus applied only to local commerce.

In *Tyler Pipe*, this Court held "Washington's multiple activities exemption invalid." 483 U.S. at 253. The multiple activities exemption was defective because it applied only if a business paid a Washington selling B&O tax. It did not apply if a similar selling tax was paid to another state. This violated the principle of internal consistency—"that is the [tax] must be such that, if applied by every jurisdiction, there would be no impermissible interference with free trade." *Id.* at 247.

If every state imposed the extracting, manufacturing, and selling taxes at issue in *Tyler Pipe*, an interstate manufacturer would pay multiple taxes. For example, an interstate manufacturer would pay a manufacturing B&O tax to Washington and a selling gross receipts tax to another state because the multiple activities exemption would not apply. A local manufacturer would only pay Washington's selling B&O tax because the multiple activities exemption would apply to excuse the manufacturing B&O tax.

An integral part of *Tyler Pipe* was the Court's explanation of how to repair the system. Washington could

make the multiple activities exemption internally consistent by extending equivalent benefits to interstate commerce. According to the Court: "The parallel condition precedent for a valid multiple activities exemption eliminating exposure to the burden of a multiple tax on manufacturing and wholesaling would provide a credit against Washington tax liability for wholesale taxes paid by local manufacturers to any State, not just Washington." *Id.* at 246. This credit prescription was repeated later in the opinion when the Court stated that "an expansion of the multiple activities exemption to provide out-of-state manufacturers with a credit for manufacturing taxes paid to another State would presumably cure the discrimination." *Id.* at 249.

A second significant holding in *Tyler Pipe* concerned apportionment. This Court affirmed the Washington Supreme Court's holding that the selling B&O taxes paid by Tyler Pipe and many of the current petitioners were fairly apportioned. *Id.* at 248-51.

B. *National Can II.*

Washington argued in *Tyler Pipe* that any decision adverse to the State should have only prospective application. Brief for Appellee at 44-48, Tr. of Oral Arg. at 44, *Tyler Pipe* (Nos. 85-1963 and 85-2006). Acknowledging the argument, this Court vacated the Washington Supreme Court's judgments in *Tyler Pipe Indus., Inc. v. Department of Rev.*, 105 Wash. 2d 318, 715 P.2d 123 (1986), and *National Can Corp. v. Department of Rev.*, 105 Wash. 2d 327, 732 P.2d 134 (1986) (*National Can I*), and remanded for further proceedings not inconsistent with its opinion. 483 U.S. at 251-53.

On remand, the Washington Supreme Court held this Court's discrimination holding applied purely prospectively, employing the federal civil retroactivity analysis of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). *National Can Corp. v. Department of Rev.*, 109 Wash. 2d 878, 749 P.2d 1286, *appeal dismissed, cert. denied*, 486 U.S. 1040 (1988) (*National Can II*). The *Tyler Pipe* plaintiffs therefore were denied any

refunds for taxable activities before June 23, 1987, the date of this Court's decision. The *Tyler Pipe* decision was purely prospective because the decision did not apply retroactively to the litigants in that case.

After the ruling in *National Can II*, hundreds of other taxpayers dismissed their refund claims for tax periods before the *Tyler Pipe* decision.

C. *American National Can* and *Digital Equipment.*

Tyler Pipe was handed down on June 23, 1987. Seven weeks later, on August 11, 1987, Washington enacted the two-way credit system suggested by this Court in *Tyler Pipe* to eliminate the constitutional defects of the multiple activities exemption. Wash. Rev. Code § 82.04.440; 1987 Wash. Laws, 2d Ex. Sess., ch. 3 (App. 1a).

Under section 3 of the 1987 law, if a court determined that relief was appropriate regarding the former multiple activities exemption for any periods before the law's August 12, 1987 effective date, refunds based on the two-way credits were to be the exclusive relief available to taxpayers. (App. 4a). Since *Tyler Pipe* was purely prospective, no relief was appropriate under section 3 for any periods before that decision.

In *American Nat'l Can Corp. v. Department of Rev.*, 114 Wash. 2d 236, 787 P.2d 545, *cert. denied*, 498 U.S. 880 (1990), a large group of corporations, including about one-half of these petitioners, next challenged the 1987 two-way credit law, as well as its retroactive application to the seven-week "interim period" after the *Tyler Pipe* decision from June 23 through August 11, 1987. The corporations claimed the 1987 law discriminated against interstate commerce and violated principles of equal protection and due process of law. *Id.* at 241. In *American Nat'l Can*, the Washington Supreme Court upheld the constitutionality of the 1987 two-way credit law and applied it retroactively to the seven-week interim period.

In *Digital Equipment Corp. v. Department of Rev.*, 129 Wash. 2d 177, 916 P.2d 933 (1996), *cert. denied*, 520 U.S. 1273 (1997), the Washington Supreme Court reaffirmed its holding in *American Nat'l Can* that retroactive application of the two-way credits to the seven-week interim period was constitutional. In *Digital*, five members of the court questioned the court's earlier decision in *National Can II* that *Tyler Pipe* should be given prospective application. Three justices, in the lead opinion, concluded that the court in *National Can II* erroneously addressed an issue that was not left open by the mandate. 129 Wash. 2d at 183-89, 194, 916 P.2d at 936-38, 941. Two other justices disagreed with this conclusion, but stated in dictum that they disagreed with the prospectivity holding in *National Can II*. *Id.* at 195 & n.76, 916 P.2d at 942 & n.1. Four justices disagreed with the lead opinion and would have followed *National Can II*. They concluded that departing from *National Can II* would result in selective prospectivity, which this Court has rejected. *Id.* at 205-10, 916 P.2d at 947-49.

Although the *Digital* court was divided over the prospective application of *Tyler Pipe*, the justices agreed that retroactive application of credits for gross receipts taxes paid to other jurisdictions was a constitutional way to correct any discrimination caused by the multiple activities exemption.

III. Procedural History of This Case.

In December 1984, petitioner Buffelen Woodworking Company filed a complaint for refund of manufacturing B&O taxes, alleging that taxes it had paid since January 1980 violated the Commerce Clause. *Buffelen* was one of well over 300 refund actions filed between 1984 and 1990 challenging Washington's B&O taxes on Commerce Clause grounds. Many of these actions involved more than one taxpayer. By 1994, slightly more than 100 actions remained, the rest having been dismissed. On March 4, 1994, over the objection of the defendant Washington State Department of Revenue (Department), the trial court consolidated 103 of the actions

(with approximately 220 plaintiffs) for all purposes under the caption of *Buffelen Woodworking Co. v. State*.

By 1997, only 47 of the 103 consolidated actions remained, the rest having been dismissed by stipulation or by motion of the Department. On May 15, 1997, the trial court granted the plaintiffs' motions to bring three more refund actions under the March 1994 consolidation order, bringing the total to 50 actions with approximately 115 named plaintiffs.

By 1994, two injunction actions presenting similar issues also were pending before the same trial court: *W.R. Grace & Co.—Conn. v. State* and *Chrysler Motors Corporation v. State*. *Grace* and *Chrysler* were not consolidated with *Buffelen*, but the taxpayers in those cases were represented by the same counsel. In April 1996, the trial court heard cross-motions for partial summary judgment in *Grace* and *Chrysler*. The Department's motions were limited to questions of issue preclusion. The taxpayers' motions sought only interlocutory orders declaring (1) that *Tyler Pipe* applied retroactively, (2) that taxes assessed against them for any periods before June 23, 1987 were "void and unenforceable," (3) that taxes assessed against them for any later periods discriminated against interstate commerce, and (4) that neither claim preclusion nor issue preclusion barred the taxpayers' requested relief.

The trial court denied the Department's motions and granted the two taxpayers' motions in part, ruling that *Tyler Pipe* applied retroactively. In addition, the trial court *sua sponte* granted the Department partial summary judgment that the two-way credit law, when applied retroactively and prospectively to all the assessment periods, was constitutional. After further proceedings, the trial court entered final summary judgment orders in *Grace* and *Chrysler* in June 1997.

On May 23, 1997, the plaintiffs in the 50 consolidated *Buffelen* actions noted a joint motion for partial summary judgment for hearing on June 20, 1997. Like the taxpayers' motions in *Grace* and *Chrysler*, the *Buffelen* motion sought

only an interlocutory order declaring that (1) *Tyler Pipe* applied retroactively to invalidate taxes allegedly paid by the plaintiffs for pre-*Tyler Pipe* tax periods, (2) due process required that the plaintiffs receive full refunds of any unconstitutional taxes they might have paid, and (3) neither issue preclusion nor claim preclusion barred any plaintiff from obtaining the relief sought in the motion. The Department made no cross-motion for summary judgment in response to the plaintiffs' motion, but moved to strike certain evidence offered in support of their motion and filed seven affidavits demonstrating that the plaintiffs were not entitled to the relief sought in their motion.

Consistent with its earlier rulings in *Grace* and *Chrysler*, the trial court granted the *Buffelen* plaintiffs' motion only in part, concluding that the *Tyler Pipe* discrimination ruling applies retroactively. The trial court concurrently advised the parties of its intent to enter *sua sponte* an order in *Buffelen* granting partial summary judgment to the Department like the *sua sponte* orders in *Grace* and *Chrysler*. The Department opposed entry of such an order in its favor because of several other issues in *Buffelen* that were unresolved, including claim preclusion, issue preclusion, and standing.

The 50 cases consolidated in *Buffelen* involved approximately 115 named plaintiffs. The consolidated case was unwieldy and, as a result, the record is far from complete. Petitioners assert that they engage in a combination of manufacturing and selling activities in interstate commerce and have paid the Washington manufacturing or selling taxes. Pet. 2-3. This statement is inaccurate. For example, one of the petitioners, Hecla Mining Company, seeks a refund of only extracting B&O taxes. The misstatement illustrates a central problem in the case. There are so many petitioners that their claims are confused and the record is inadequate.

For many of the petitioners, there is no admissible evidence in the record that they engaged in manufacturing or extracting or even that they paid B&O taxes of any kind to

Washington. There also is a substantial dispute about the tax periods involved in these consolidated actions that the trial court refused to resolve. The trial court declined to rule which if any of the petitioners have standing to litigate the constitutional issues it decided. Since many of the petitioners also were parties in *Tyler Pipe* and *American Nat'l Can*, they may be barred by issue preclusion from relitigating the apportionment issue resolved in Washington's favor in *Tyler Pipe* and the issue of the validity of the two-way credit resolved in Washington's favor in *American Nat'l Can*. Many of the petitioners also may be barred by claim preclusion from bringing successive refund actions for the same tax periods involved in *Tyler Pipe* and *American Nat'l Can*. The trial court also refused to address these issues.

On July 18, 1997, before entering a summary judgment order in *Buffelen*, the trial court granted the plaintiffs' motion to modify the March 1994 order consolidating the *Buffelen* cases. The court severed three plaintiffs, Anheuser-Busch, Inc., Apple Computer, Inc., and Herman Miller, Inc., and "consolidated" all their refund claims under the caption of *Anheuser-Busch, Inc. v. State*. These three plaintiffs asserted that even if Washington's selling B&O taxes were constitutional, they were not subject to them because they did not sell the products in Washington. These "place of sale claims" provided an independent state law basis for granting refunds to these petitioners. The trial court did not rule on these "place of sale claims."

After the trial court severed the three *Anheuser-Busch* plaintiffs, it entered single *sua sponte* summary judgment orders in *Buffelen* and in *Anheuser-Busch*. Pet. 61a-80a. In the two orders, the trial court ruled that *Tyler Pipe* should be applied retroactively, but that refunds for pre-*Tyler Pipe* tax periods would be limited to amounts based on credits for any gross receipts taxes the plaintiffs paid to other jurisdictions. Because all the plaintiffs waived any refund claims based on such credits for all tax periods at issue in their refund actions,

the trial court awarded no tax refunds to any of them. The court's *sua sponte* summary judgment orders dismissed the plaintiffs' refund claims with prejudice, except for those of the three plaintiffs in the consolidated *Anheuser-Busch* action. The court also entered findings under Wash. Super. Ct. Civ. R. 54(b) in *Anheuser-Busch* to permit the parties to appeal that interlocutory partial summary judgment order.

The trial court denied the Department's motions for reconsideration in both consolidated actions on September 5, 1997. The plaintiffs in both *Buffelen* and *Anheuser-Busch* appealed to the Washington Supreme Court, which granted their motion to consolidate the two appeals. The plaintiffs in *Grace* and *Chrysler* earlier had appealed to the Washington Supreme Court, which had consolidated their two appeals at the suggestion of those plaintiffs. The Department cross-appealed in all four cases, seeking review of the trial court's rulings that *Tyler Pipe* applied retroactively. In *Buffelen* and *Anheuser-Busch*, the Department also sought review of the trial court's refusal to resolve the questions of standing, issue preclusion, and claim preclusion.

Although *Grace/Chrysler* and *Buffelen/Anheuser-Busch* were separately briefed and argued, the Washington Supreme Court issued a single opinion to resolve the two consolidated appeals. In its opinion, the court affirmed three key rulings of the trial court. First, the court decided that *Tyler Pipe* applies retroactively based only on "principles of stare decisis," concluding that a majority of the court had so held in *Digital*. 137 Wash. 2d at 592-93, 973 P.2d at 1017 (Pet. App. 11a-12a). Second, the current B&O tax system with its two-way credit system complies with all Commerce Clause requirements. 137 Wash. 2d at 596-98, 973 P.2d at 1018-19 (Pet. App. 15a-17a). Third, retroactive application of the two-way credits to cure the discrimination caused by the former multiple activities exemption does not violate due process. 137 Wash. 2d at 598-603, 973 P.2d at 1019-22 (Pet. App. 18a-24a).

The court did not decide, however, several other federal and state law questions raised by the Department, including standing, issue preclusion, and claim preclusion, that are intertwined with the federal questions presented by petitioners. Instead, the court "preserv[ed]" those questions "for trial court resolution on remand, as may be necessary." 137 Wash. 2d at 584, 973 P.2d at 1013 (Pet. App. 2a). Although the court declined to decide the standing, issue preclusion, and claim preclusion issues, the court commented that they were "plainly the most significant and meritorious" of the issues presented in the Department's cross-appeals. 137 Wash. 2d at 591 & n.7, 973 P.2d at 1016 & n.7 (Pet. App. 9a-11a).

The court stated in conclusion it was "affirm[ing] the trial court judgments on these key points" and "remand[ing] the cases to the trial court for further action consistent with this opinion." 137 Wash. 2d at 604, 973 P.2d at 1022 (Pet. App. 25a). All the plaintiffs in *Buffelen* and *Anheuser-Busch*, except Grace and Chrysler, filed a joint petition to this Court. Grace and Chrysler also filed a joint petition, No. 99-31. The Department filed a conditional cross-petition, No. 99-223, in response to the joint petition in No. 99-31.

REASONS WHY THE PETITION SHOULD BE DENIED

There is no basis for review in this case. The decision of the Washington Supreme Court is correct, and petitioners have not cited any decision of this Court or any other court in conflict with the decision below. In fact the questions presented by petitioners have long been settled. Many of the petitioners merely are trying to relitigate issues they lost in *Tyler Pipe* and *American Nat'l Can*. The petition should be denied.

I. The Court Lacks Jurisdiction Because There Is No Final Judgment.

This Court has jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had[.]" 28 U.S.C. § 1257(a). If the decision

of the highest state court is not a final judgment, this Court lacks jurisdiction over the case. *Flynt v. Ohio*, 451 U.S. 619 (1981). Traditionally, the Court also requires state court judgments to be final as to all parties and issues. For example, if there are multiple defendants, the record must show that the judgment concludes the controversy as to all of them. *Meagher v. Minnesota Thresher Mfg. Co.*, 145 U.S. 608, 611 (1892); R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 94 (7th ed. 1993). Since the claims of all the petitioners have been consolidated into a single case, the decision below must resolve the controversy completely as to all of them. The controversy is not completely resolved because the Washington Supreme Court "remand[ed] the cases to the trial court for further action consistent with this opinion." 137 Wash. 2d at 604, 973 P.2d at 1022 (Pet. 25a). *See Hathorn v. Lovorn*, 457 U.S. 255, 262 (1982).

Under the Washington Supreme Court's opinion, the trial court must determine which, if any, of the petitioners has standing to litigate the questions presented in their petition. The trial court must also resolve federal and state law questions of issue preclusion based on the judgments in *Tyler Pipe* and *American Nat'l Can*. There also are unresolved questions of claim preclusion, which would prevent petitioners that were parties in *Tyler Pipe* or *American Nat'l Can* from bringing successive refund actions for the same tax periods. *See* 137 Wash. 2d at 584, 592, 973 P.2d at 1013, 1016-17 (Pet. App. 2a, 10a-11a). Finally, the trial court must address the "place of sale claims" of the petitioners in *Anheuser-Busch*.

This case does not fall within *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), which holds that a decision may be a final judgment even though the case is remanded to a trial court for further proceedings. First, under *Cox* a decision is final if "the federal issue is conclusive or the outcome of further proceedings preordained." *Id.* at 479. The remaining issues in this case are not controlled or preordained by the

Washington Supreme Court's decision sustaining the validity of the B&O tax and the two-way credit.

Second, a decision is final if the federal issue "will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. In this case, the constitutional issues will not necessarily all survive if Washington substantially prevails on standing, issue preclusion, and claim preclusion. Nor will the issues survive in *Anheuser-Busch* if those petitioners prevail on their "place of sale claims."

Third, a decision is final if "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. In this case, the federal issue might be preserved if some petitioners prevail on standing, issue preclusion, and claim preclusion, or if the *Anheuser-Busch* petitioners are unsuccessful in their "place of sale claims."

Finally, the Court occasionally considers a decision final where "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action[.]" *Id.* at 482-83. The Court has applied this exception only when there were "identifiable federal statutory or constitutional policies which would have been undermined by the continuation of the litigation in the state courts." *Flynt v. Ohio*, 451 U.S. at 622. In this case, there are no federal policies that would be undermined by continuation of the litigation. Indeed, as we have pointed out, this case involves long settled law.

If this case falls within *Cox Broadcasting*, the Court should decline to exercise its discretionary jurisdiction because the record is inadequate for review. The trial court did not require petitioners to prove the factual predicates of their claims. See pages 8-9, *supra*. This Court has refused to exercise its jurisdiction when confronted with such an inadequate record. For example, in *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947), an appellant sought review of a city ordinance governing charitable solicitations. The Court observed that it

follows "a policy of strict necessity in disposing of constitutional issues" such that it will not resolve a constitutional question unless it is necessary. *Id.* at 568-69. One rule the Court applies as part of this policy is to examine "if the record presents some other ground upon which the case may be disposed of[.]" *Id.* at 569.

In *Rescue Army*, the Court refused to exercise its jurisdiction because the record was inadequate. *Id.* at 575 ("The record presents only bare allegations that he was charged criminally with violating [the ordinance] and that those sections are unconstitutional, on various assignments, as applied to his alleged solicitations.") The same is true in this case. The Court should not exercise its jurisdiction until it has an adequate record before it to resolve all the federal questions raised in the case.

II. Retroactive Application of the 1987 Two-Way Credits Does Not Violate Due Process.

A. Petitioners Are Entitled to No Relief for Pre-*Tyler Pipe* Tax Periods Because *Tyler Pipe* Should Be Applied Prospectively.

Before turning to petitioners' due process arguments, there is an independent basis for sustaining the Washington Supreme Court's decision that the *Buffelen* petitioners are not entitled to refunds for periods before *Tyler Pipe*. There is no possible basis for pre-*Tyler Pipe* relief unless that decision applies retroactively. Thus, the question whether *Tyler Pipe* applies retroactively is a "necessary predicate" to both of petitioners' Due Process Clause questions.

In *National Can II*, 109 Wash. 2d 878, 749 P.2d 1286, *appeal dismissed, cert. denied*, 486 U.S. 1040 (1988), the Washington Supreme Court initially held that the Commerce Clause discrimination ruling this Court announced in *Tyler Pipe* applied purely prospectively. Now, years later, the court below has reversed course and applied *Tyler Pipe* retroactively. As a result, *Tyler Pipe* has been applied prospectively to some

litigants and retroactively to others. This is exactly the kind of selective prospectivity this Court condemned in *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529 (1991), and *Harper v. Virginia Dep't of Taxation,* 509 U.S. 86 (1993).

The Washington Supreme Court erred in giving *Tyler Pipe* retroactive application. As the prevailing party below, the Department may defend its orders of dismissal against petitioners on any ground properly raised below, whether that ground was relied upon, rejected, or even considered by the courts below. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970). If the Court were to review either of the Due Process Clause questions presented by petitioners, the Department would defend its orders of dismissal on the basis of this selective prospectivity question it argued and preserved below.[2]

B. Petitioners' Argument that Retroactive Application of the Two-Way Credits Fails to Provide Them "Meaningful Backward-Looking Relief" Is Meritless.

Petitioners devote most of their petition to an argument that retroactive application of the 1987 two-way credit statute violates the Due Process Clause as interpreted in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). Pet. 12-24. The court below correctly concluded that this argument is meritless. 137 Wash. 2d at 594-98, 973 P.2d at 1018-19 (Pet. App. 13a-17a).

Petitioners seem to suggest that retroactive application of the two-way credit statute is "inadequate" because it "does not comport with any of the three alternatives this Court specified in *McKesson* as the permissible retrospective cures for a discriminatory tax scheme." Pet. 15-16. That argument is

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[2] This selective prospectivity question is addressed more fully in the Department's conditional cross-petition in Supreme Court No. 99-233.

based on an obvious misreading of *McKesson*.[3] As the court below recognized, the *McKesson* line of cases hold that a "State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to that determination," and that the Due Process Clause demands only that, "to cure the illegality of the tax as originally imposed," the State must "ultimately collect a tax for the contested tax period" that no longer impermissibly discriminates. 137 Wash. 2d at 594-95, 973 P.2d at 1018 (Pet. App. 13a-15a) (quoting *McKesson*, 496 U.S. at 39-40, and *Associated Indus. v. Lohman*, 511 U.S. 641, 656 (1994)). Retroactively extending the benefit of the two-way credits to petitioners does exactly that.[4]

Petitioners also attempt to compare this relief to the hypothetical retroactive tax scheme proposed by Florida and rejected by this Court in *McKesson*, arguing that "Washington

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[3] In *Digital*, 129 Wash. 2d 177, 191, 916 P.2d 933 (1996), *cert. denied*, 520 U.S. 1273 (1997), the taxpayer made the same erroneous argument.

[4] Petitioners' reliance on the California Court of Appeal's decision in *General Motors Corp. v. City & County of San Francisco*, 69 Cal. App. 4th 448, 81 Cal. Rptr. 2d 544 (1999), is misplaced. The California court reasoned that the two-way credits this Court suggested in *Tyler Pipe* (which Washington quickly adopted) "would effectively make local and out-of-state manufacturers equally subject to selling taxes and exempt from manufacturing taxes." *Id.* at 456, 81 Cal. Rptr. 2d at 548-49. In contrast, the credits San Francisco proposed "would not fully eliminate the discrimination suffered by General Motors[.]" *Id.* Furthermore, when the California court discussed the Washington Supreme Court's approval in *Digital* of retroactively applying the two-way credits, the California court distinguished *Digital* as involving "recent tax years" (August 1987 credits applied retroactively to January 1983) and a taxpayer that candidly conceded "it had not been double taxed." *Id.* Thus, the California court did not perceive its holding to be in conflict with that of the Washington Supreme Court in *Digital*. (Here, less than one-third of these petitioners have refund claims for any periods before January 1983, and only three petitioners made any attempt to prove they ever might have been "double taxed.") Regardless of how petitioners interpret the California intermediate appellate court's decision, however, surely they understand that the decision would not create a "conflict" on an "important federal question" within the meaning of Rule 10(b). *See* Pet. 14-15.

did not apply the credits" for pre-*Tyler Pipe* tax periods "as to intrastate commerce[.]" Pet. 15-16. That is not a valid comparison. There is nothing "hypothetical" about the refunds Washington offered to pay petitioners for any gross receipts taxes they paid to other jurisdictions. That petitioners spurned this relief does not make it any less "actual." And since retroactively granting the credits to interstate businesses completely eliminates their "exposure to the burden of a multiple tax on manufacturing and wholesaling," *Tyler Pipe*, 483 U.S. at 246, we cannot perceive how *McKesson* mandates that petitioners receive any additional retroactive relief.

Petitioners next assert they "paid Washington over $100,000,000" of unconstitutional taxes, but received "zero relief." Pet. 16-18. They attribute the result to burdensome "procedures and requirements" that were "impossible" for them to satisfy. Pet. 13, 18. However, as explained above, beyond bare allegations, there is almost nothing in the record suggesting that petitioners paid any B&O taxes—constitutional or otherwise—to Washington during the periods in contest. Furthermore, in rejecting petitioners' due process arguments, the court below understood the *real* reason why petitioners received "zero relief": "Because the taxpayers waived any refund claims based on [credits for gross receipts taxes paid to other jurisdictions], the trial court awarded no tax refunds to any of them." 137 Wash. 2d at 589, 973 P.2d at 1015 (Pet. App. 7a). Petitioners cannot turn their tactical decision to refuse any relief into the foundation for a federal claim under the Due Process Clause.

Petitioners wrongly claim[5] that the two-way credit involves burdensome recordkeeping requirements including

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[5] Petitioners are well aware that the Department does not require special records because they made the same claim in *American Nat'l Can*. In response the Department submitted affidavits explaining what records are required and how a test period is used to establish a claim for credits. See App. 24a-32a. These affidavits were submitted in this case as part of the Department's argument that issue preclusion bars many of the petitioners,

special records to trace which specific products manufactured elsewhere are sold in Washington. Pet. 15 n. 16, 20. Washington only requires the normal records maintained by a business such as sales contracts, shipping documents and tax returns. Wash. Admin. Code § 458-20-19301(9). App.18a-19a. There is no requirement for special records to trace specific products. Instead the Department authorizes taking credits based on a "test period, formulary or volume percentage basis[.]" Wash. Admin. Code § 458-20-19301(8)(b). (App. 18a).[6]

Finally, petitioners argue at length that the 1987 two-way credit system cannot "create in hindsight a nondiscriminatory scheme" because that system allegedly "continues to discriminate against interstate commerce." Pet. 17-24. The court below was familiar with these arguments, having answered them previously in *American Nat'l Can*. *See* 137 Wash. 2d at 586, 591, 596, 973 P.2d at 1014, 1016, 1019 (Pet. App. 4a, 9a, 15a).[7]

First, petitioners argue that "strict criteria" for qualification of other states' taxes exclude "the vast majority" of those taxes, thereby creating "facial discrimination." Pet. 19-20, 23. This is petitioners' way of saying that the credits apply only to gross receipts taxes, not to net income taxes, value added taxes, or franchise taxes. *See* Wash. Rev. Code § 82.04.440(5). When presented with this same argument in *American Nat'l Can*, the Washington Supreme Court explained

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who were parties in *American Nat'l Can*, from relitigating the validity of the two-way credit.

[6] For example, the trial court awarded Chrysler tax credits in the amount of $125,000 based only on general business records, with no requirement of product tracing. See Respondent's Brief in Opposition W.R. Grace-Conn. v. State, Supreme Court. No. 99-31.

[7] About one-half of these petitioners were parties in *American Nat'l Can*. App. 22a-23a. Under state issue preclusion rules, they should have been precluded from relitigating this issue. The Washington Supreme Court remanded the case to the trial court to address this issue preclusion question.

in detail why this "cannot constitute facial discrimination." 114 Wash. 2d at 241-44, 787 P.2d at 547-49. *See Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. at 175, 192 n.6 (1995) (discussing the requirement that if states provide credits for payment of "in-state taxes," they must extend such credits to payment of "equivalent out-of-state taxes").

Second, in a related argument, petitioners rely on their own failure to qualify for the credits and meaningless statistics to contend that the two-way credit system discriminates against interstate commerce "in practical effect." Pet. 17-22. This argument also was answered in *American Nat'l Can*, where similar statistics were offered to prove the "continuing discriminatory effect of Washington's law." 114 Wash. 2d at 240, 246-47, 787 P.2d at 547, 550. The statistics simply reflect the fact that few states other than Washington currently impose gross receipts taxes on businesses. That other sovereign states have made different tax choices does not render Washington's tax system discriminatory. The validity of one state's tax system does not depend on the tax laws of other states. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 277 n.12 (1978); *Freeman v. Hewitt*, 329 U.S. 249, 256 (1946); *see also Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 338 (1994) (O'Connor, J., concurring in the judgment in part and dissenting in part) (recognizing the "well-established proposition that States need not conform their taxing practices to those of their neighbors").[8]

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[8] This Court applies the hypothetical internal consistency test precisely because "[a]ny other rule would mean that the constitutionality of [a State's] tax laws would depend on the shifting complexities of the tax codes of 49 other States[.]" *Tyler Pipe*, 483 U.S. at 247 (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 644-45 (1984)). Petitioners must concede that Washington's two-way credit system is internally consistent. Furthermore, if every other state *actually* imposed some form of gross receipts taxes on extracting, manufacturing, and selling activities, at higher rates than Washington's B&O taxes on those three activities, what petitioners call the External Credit would "eliminate 100%" of interstate manufacturers' selling B&O tax liabilities *and* would "eliminate 100%" of

Third, based on the false premise that Washington does not offer equivalent credits to interstate businesses, petitioners argue that the two-way credit system gives local manufacturers a "half-price deal" denied to interstate manufacturers. Pet. 21-23. This is the same as the "two privileges" argument rejected in *American Nat'l Can*. 114 Wash. 2d at 245-46, 787 P.2d at 549. Noticeably lacking supporting authority, the argument amounts in substance to an assertion that the negative Commerce Clause prohibits a state from ever providing a credit for one of its taxes against another—regardless of whether the state also provides an equivalent credit for similar out-of-state taxes. The decisions of this Court hold to the contrary. *See Jefferson Lines*, 514 U.S. at 192 n.6.[9]

In short, neither the Due Process Clause question nor the Commerce Clause discrimination question presented by petitioners is a substantial federal question.

C. Petitioners' "Bait and Switch" Procedural Due Process Argument Also Is Meritless.

Petitioners also argue the Washington Supreme Court's retroactive application of the 1987 two-way credit statute, as the appropriate relief for the Washington court's retroactive application of *Tyler Pipe*'s discrimination ruling, conflicts with this Court's decisions in *Reich v. Collins*, 513 U.S. 106 (1994), and *Newsweek, Inc. v. Florida Dep't of Rev.*, 522 U.S. 442 (1998). Pet. 3-4, 7-12. As the court below correctly concluded, petitioners' reliance on *Reich* and *Newsweek* as support for their "bait and switch" attack on the 1987 credit

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their manufacturing B&O tax liabilities. Without changing any feature of its tax system, Washington would then have an "automatic External Credit." Pet. 18-19. This demonstrates that the alleged "profound disparities in the actual benefits conferred" by Washington's two-way credit system are the product of other states' tax policy choices, not anything inherent in the 1987 two-way credit law.

[9] At pages 21-24 of the petition, petitioners also present what in substance are arguments that Washington's taxes are unfairly apportioned. We discuss apportionment at pages 24-30, *infra*.

statute is misplaced. 137 Wash. 2d at 593-96, 598-99, 973 P.2d at 1017-18, 1019-20 (Pet. App. 12a-15a, 18a-19a).

In *Reich*, the Georgia Supreme Court interpreted a broadly worded statute authorizing a taxpayer to claim a refund of "any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him" as inapplicable when a tax statute is declared unconstitutional. 513 U.S. at 109. Therefore, the Georgia court dismissed the refund action *without addressing the merits* of Reich's federal claims. *Id.* at 110. This Court reversed, holding that the Due Process Clause did not permit Georgia to hold out a "clear and certain" postpayment procedural remedy in the form of a refund action and then, after taxpayers had paid disputed taxes, to declare no such procedural remedy ever existed. *Id.* at 111.

In *Newsweek*, the Florida District Court of Appeal, failing to consider this Court's holding in *Reich*, interpreted Florida law as permitting prepayment tax challenges and therefore dismissed Newsweek's postpayment refund action to contest sales taxes the Florida Supreme Court earlier had held to violate the First Amendment. This Court summarily reversed, explaining that under Florida law there was a longstanding practice of permitting taxpayers to bring refund actions for taxes paid under an unconstitutional statute and that the State did not dispute "this settled understanding" of Florida law. Based on *Reich*, this Court held that Newsweek was entitled to a clear and certain remedy and thus it could "use the refund procedures to adjudicate the merits of its claim."

The problem in *Reich* and *Newsweek* was that the state went from a post-deprivation refund remedy to an exclusive pre-deprivation remedy. Thus, it was impossible to challenge taxes that had already been paid. Washington's two-way credit law did not "switch" the post-deprivation refund remedy to a pre-deprivation remedy. The two-way credit law authorized refunds necessary to cure the constitutional defect in the multiple activities exemption. This Court has recognized that states have the authority to tailor a refund remedy to cure

constitutional defects in their tax systems. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39-41, 44 n.27 (1990); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 100-02 (1993); *Associated Indus. v. Lohman*, 511 U.S. 641, 656 (1994); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 755-56 (1995).

Washington law offered these petitioners a choice of either a prepayment procedural remedy (an injunction action under Wash. Rev. Code § 82.32.150) or a postpayment procedural remedy (a refund action under Wash. Rev. Code § 82.32.180). Petitioners chose to pursue refund actions. In sharp contrast to what occurred in *Reich* and *Newsweek*, the courts below adjudicated the merits of their claims. That is all the "process" petitioners were "due" in this situation. There was no "bait and switch." Petitioners received precisely the postpayment procedural remedy promised by Washington law.

Petitioners' assertion that until August 1987 Washington law promised them full refunds of any taxes they paid is both incorrect and immaterial. The statute petitioners allegedly relied upon (Pet. 9), Wash. Rev. Code § 82.32.180, has never required full refunds whenever a tax statute is declared unconstitutionally discriminatory. It is merely a conditional waiver of the State's sovereign immunity pursuant to Wash. Const. art. II, § 26, which provides that the Washington Legislature "shall direct by law, in what manner, and in what courts, suits may be brought against the state." *Lacey Nursing Ctr., Inc. v. Department of Rev.*, 128 Wash. 2d 40, 48-54, 905 P.2d 338, 342-45 (1995).

As such, it is only a procedural statute. It provides no direction to the courts as to what form or degree of backward-looking relief, if any, is appropriate when a tax statute or its application is declared invalid. Such a question of appropriate relief always has been determined on a case-by-case basis by considering all pertinent provisions of federal and state law, including any applicable state statutes enacted before the action is concluded. *See, e.g., American Nat'l Can*, 114 Wash. 2d

236, 249-53 & n.4, 787 P.2d 545, 551-53 & n.4, *cert. denied*, 498 U.S. 880 (1990); *Bond v. Burrows*, 103 Wash. 2d 153, 161-63, 690 P.2d 1168, 1172-73 (1984); *Benjamin Franklin Thrift Stores, Inc. v. Henneford*, 187 Wash. 472, 484-88, 60 P.2d 86, 91-93 (1936); *Jensen v. Henneford*, 185 Wash. 209, 220, 53 P.2d 607 (1936); *Nipges v. Thornton*, 119 Wash. 464, 467-68, 206 P. 17, 18-19 (1922); *Simpson v. State*, 26 Wash. App. 687, 695-96, 615 P.2d 1297, 1301-02, *review denied*, 94 Wash. 2d 1022 (1980); Wash. Rev. Code § 82.98.030.

Moreover, petitioners were on notice, as of April 30, 1985, that they definitely would *not* be entitled to full refunds under Washington law if they were to obtain a judgment that the former multiple activities exemption statute discriminated against interstate commerce. That was the effective date of the conditional one-way credit law, which limited potential refunds to selling gross receipts taxes paid to other jurisdictions. 1985 Wash. Laws Ch. 190, § 4. App. 5a.

Nor could petitioners reasonably believe they would receive full refunds based on the vague dictum[10] later appearing in *National Can II*: "If the taxes were collected in violation of the constitution, then the state refund statutes would mandate refunds." 109 Wash.2d at 880-81, 749 P.2d at 1286. In that dictum, the Washington court did not say that state law would mandate *full* refunds if *Tyler Pipe* were applied retroactively; it said "refunds" would be required. Two years after *National Can II*, when the court actually confronted the question of appropriate relief under Washington law for the Commerce Clause discrimination holding in *Tyler Pipe*, the court squarely held that "[f]ull refunds are not appropriate" and that the taxpayers instead were entitled to more limited refunds

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[10] As explained at page 4, *supra*, the Washington Supreme Court held in *National Can II* that the discrimination ruling announced in *Tyler Pipe* applied purely prospectively. Because the Washington Supreme Court held the former multiple activities exemption was constitutional during all the tax periods at issue in *National Can II*, *see* 109 Wash. 2d at 881, any discussion of what would otherwise be appropriate retroactive relief in that case obviously was unnecessary to the court's decision.

based on the retroactive application of the two-way credit law. *American Nat'l Can*, 114 Wash. 2d at 253, 787 P.2d at 583. Thus, in referring to "refunds" in *National Can II*, the court probably meant refunds based on retroactive application of the 1985 and 1987 credit statutes.[11]

Regardless of whether petitioners' characterization of Washington law before August 1987 is accurate, however, it is immaterial. Neither *Reich* nor *Newsweek* overruled the *McKesson* line of cases, which permitted the State of Washington to retroactively "reformulate and enforce" its B&O taxes "during the contested tax period[s] in any way that treats petitioner[s] and [their] competitors in a manner consistent with the dictates of the Commerce Clause." *McKesson*, 496 U.S. at 40. That is precisely what the Washington Legislature did in 1987 and what the Supreme Court of Washington did below. *Reich* and *Newsweek* are consistent with the *McKesson* line of cases because the changes from a post-deprivation remedy to a pre-deprivation remedy in *Reich* and *Newsweek* were unrelated to curing the underlying discrimination problems with the taxes at issue.

In short, this Due Process Clause question presented by petitioners is not a substantial federal question.

III. The Apportionment Questions Petitioners Pose Are So Explicitly Foreclosed by Prior Decisions of This Court As To Leave No Room for Real Controversy.

Petitioners argue their petition should be granted "to resolve a question left open" by this Court's earlier decisions. That question, according to petitioners, is "Does an unapportioned tax on the gross income of interstate

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[11] Unlike the taxpayers in *Reich* and *Newsweek*, it is hard to fathom how the court's dictum in *National Can II* could have induced petitioners to take any actions they otherwise would not have taken. *National Can II* was issued in 1988, *after* the last of the petitioners' taxes allegedly were paid in November 1987 in reliance on the State's "bait." See Pet. 8, 11.

manufacturers violate the Commerce Clause requirement of fair apportionment?" Pet. 24.[12]

Petitoners' question misstates Washington law. Washington does not impose a tax on the "gross income of interstate manufacturers." Washington only taxes extracting, manufacturing, and selling activities that take place in this state. If a Washington business manufactures a product in California and sells it in Oregon, not one cent of the gross income from those activities will be subject to B&O tax. None of Washington's B&O taxes are unapportioned. The extracting, manufacturing, and selling B&O taxes all are inherently apportioned because the taxes apply only when those taxed activities (extracting, manufacturing, or sales) occur in Washington.

It is unclear what "unapportioned" Washington tax on "interstate manufacturers" petitioners are referring to. They reluctantly acknowledge that this Court unanimously upheld Washington's selling B&O taxes as fairly apportioned in *Tyler Pipe*,[13] but state that this Court "has not addressed apportionment" of Washington's B&O tax on "manufacturing activities." Pet. 26. Thus, they seem to argue that the "question left open" by this Court's earlier decisions is whether Washington's manufacturing and extracting B&O taxes are fairly apportioned.[14]

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[12] Elsewhere, petitioners state the question as "Does such a tax credit scheme, without apportionment, satisfy the nondiscrimination and apportionment requirements of the commerce clause, as interpreted in this Court's decisions?" Pet. i. Petitioners have not cited, and the Department is unaware of, any decision of this Court interpreting the negative Commerce Clause as requiring a tax credit—as opposed to a tax—to be apportioned.

[13] In rejecting the taxpayers' apportionment argument in *Tyler Pipe*, this Court correctly observed that it rested "on the erroneous assumption that through the B&O tax, Washington is taxing the unitary activity of manufacturing and wholesaling." 483 U.S. at 251.

[14] At the end of their argument, however, petitioners ask this Court to "requir[e] apportionment of gross receipts taxes on selling and

However, while petitioners did challenge the selling B&O taxes on apportionment grounds, petitioners did not present an apportionment challenge to the manufacturing and extracting B&O taxes in the Washington Supreme Court. In reviewing state court decisions under 28 U.S.C. § 1257, this Court will not consider a federal question unless it was either addressed by or properly presented to the state courts. *Street v. New York*, 394 U.S. 576, 581-85 (1969). The Washington Supreme Court's opinion below did not address any apportionment issue other than the one resolved by this Court in *Tyler Pipe*. The court below stated that petitioners "ask us to ignore our own and the United States Supreme Court's rulings and revisit the apportionment issue." 137 Wash. 2d at 596, 973 P.2d at 1019 (Pet. App. 16a).[15]

When the highest state court's decision is silent on a federal question presented in a petition, this Court assumes that the issue was not properly presented below, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987), and the petitioner bears the burden of defeating that assumption by demonstrating that the state courts had "a fair opportunity to address the federal question that is sought to be presented," *Webb v. Webb*, 451 U.S. 493, 501 (1981).

Even if this Court were to conclude that petitioners properly presented below the question whether Washington's manufacturing and extracting taxes are fairly apportioned, the question is not substantial. For nearly a century, this Court has consistently rejected Commerce Clause challenges to state or local gross receipts taxes on manufacturers or extractors measured, like Washington's B&O taxes, by the value of the

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manufacturing businesses," which suggests their petition also challenges Washington's selling B&O taxes on apportionment grounds. Pet. 30.

[15] The court cited none of this Court's or its own decisions involving apportionment challenges to manufacturing or extracting taxes, *e.g.*, *American Mfg. Co. v. St. Louis*, 250 U.S. 459 (1919); *Reynolds Metals Co. v. Washington*, 65 Wash. 2d 882, 400 P.2d 310, *appeal dismissed for want of a substantial federal question*, 382 U.S. 160 (1965), which suggests that the court was not addressing such a question.

products manufactured or extracted. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617 & n.7 (1981) (extracting); *Aponaug Mfg. Co. v. Stone*, 314 U.S. 577 (1941), *aff'g per curiam* 190 Miss. 805, 1 So. 2d 763 (1941) (manufacturing); *Utah Power & Light Co. v. Pfost*, 286 U.S. 165 (1932) (generating electricity); *Hope Natural Gas Co. v. Hall*, 274 U.S. 284 (1927) (extracting); *Lacoste v. Department of Conservation*, 263 U.S. 545 (1924) (extracting); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923) (extracting); *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922) (extracting); *American Mfg. Co. v. St. Louis*, 250 U.S. 459 (1919) (manufacturing); *see also Reynolds Metals Co. v. Washington*, 65 Wash. 2d 882, 400 P.2d 310, *appeal dismissed for want of a substantial federal question*, 382 U.S. 160 (1965) (manufacturing). This question is well-settled.

Another Commerce Clause question petitioners may be asking this Court to consider is the one they litigated below: whether Washington's selling B&O taxes are fairly apportioned. They concede that this question is not "left open" by this Court's earlier decisions, admitting that this Court has repeatedly rejected apportionment challenges to these taxes in a "series of decisions culminating in *Tyler Pipe*." Pet. 29 n.34.

In *Tyler Pipe*, this Court unanimously upheld Washington's selling B&O taxes as fairly apportioned because

> the activity of wholesaling—whether by an in-state or an out-of-state manufacturer—must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax. See *Moorman Mfg. Co. v. Bair*, 437 U.S., at 280-81 (gross receipts tax on sales to customers within State would be "plainly valid"); *Standard Pressed Steel Co. v. Washington Revenue Dept.*, 419 U.S., at 564 (selling tax measured by gross proceeds of sales is "apportioned exactly to the activities taxed").

483 U.S. at 251.

In rejecting the apportionment challenge renewed by petitioners here,[16] this Court in *Tyler Pipe* applied settled Commerce Clause case law. For well over a century, this Court has upheld nondiscriminatory gross receipts taxes on interstate sales of goods imposed by the state of destination. *Standard Pressed Steel Co. v. Department of Rev.*, 419 U.S. 560 (1975); *General Motors Corp. v. Washington*, 377 U.S. 436 (1964); *Field Enters., Inc. v. Washington*, 352 U.S. 806 (1956), *aff'g per curiam* 47 Wash. 2d 852, 289 P.2d 1010 (1955); *Norton Co. v. Department of Rev.*, 340 U.S. 534 (1951); *International Harvester Co. v. Department of Treasury*, 322 U.S. 340 (1944); *Department of Treasury v. Allied Mills, Inc.*, 318 U.S. 740 (1943), *aff'g per curiam* 220 Ind. 340, 42 N.E.2d 34 (1942); *Department of Treasury v. Wood Preserving Corp.*, 313 U.S. 62 (1941); *Sonneborn Bros. v. Cureton*, 262 U.S. 506 (1923); *Woodruff v. Parham*, 8 Wall. 123 (1868); *see also Westinghouse Elec. Corp. v. King*, 678 S.W.2d 19 (Tenn. 1984), *appeal dismissed for want of a substantial federal question*, 470 U.S. 1075 (1985); *Chicago Bridge & Iron Co. v. Department of Rev.*, 98 Wash. 2d 814, 659 P.2d 463, *appeal dismissed for want of a substantial federal question*, 464 U.S. 1013 (1983); *Stone v. Stapling Machs. Co.*, 220 Miss. 470, 71 So. 2d 205, *appeal dismissed for want of a substantial federal question*, 348 U.S. 802 (1954).

In *Jefferson Lines*, 514 U.S. 175, upon which petitioners rely, this Court upheld Oklahoma's sales tax on the

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[16] The record below shows that 19 of these petitioners were parties in *National Can I*, No. 85-2006, and litigated in *Tyler Pipe* whether Washington's B&O selling taxes are fairly apportioned. (App. 21a). Therefore, federal common law rules of issue preclusion should have prevented these petitioners and any other petitioners in privity with them from relitigating this same issue in the courts below. *See, e.g., Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994); *United States v. Stauffer Chem. Co.*, 464 U.S. 165 (1984). If this Court were to review the third question presented by petitioners, it would first need to address this threshold federal issue preclusion question. *See, e.g., Hagen v. Utah*, 510 U.S. 399, 409 (1994); *Haring v. Prosise*, 462 U.S. 306, 313-17 (1983).

full price of a ticket for interstate transportation services as consistent with the Commerce Clause. 514 U.S. at 177, 200. *Jefferson Lines* might have rendered "suspect" the continuing authority of *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948), *see Jefferson Lines*, 514 U.S. at 179, 189-92 & nn.5-6, 195-96 & n.7; *id.* at 200-01 (Scalia, J., concurring in the judgment); *id.* at 201-06 (Breyer, J., dissenting), but it did not undermine in the slightest the above lines of cases concerning taxes imposed on production or sales of goods. Indeed, in *Jefferson Lines*, this Court cited *Commonwealth Edison*, *International Harvester*, and *Tyler Pipe*, without questioning their holdings or their reasoning. *See id.* at 183, 188-89, 192 n.6, 199-200. The Washington Supreme Court below simply followed settled apportionment rules applied in this Court's controlling precedents, as was its duty.

Nor does the Washington Supreme Court's decision below create any "split of authority among the states" on this apportionment issue, as petitioners argue. Pet. 30. The decision below is not in conflict with either *City of Winchester v. American Woodmark Corp.*, 252 Va. 98, 471 S.E.2d 495 (1996), or *M & Assocs., Inc. v. City of Irondale*, 723 So.2d 592 (Ala. 1998).[17]

The gross receipts taxes the Virginia and Alabama courts struck down in *American Woodmark* and *M & Assocs.* differed dramatically from the Washington selling B&O taxes, which apply only to sales that take place in Washington. In *American Woodmark*, the city attempted to apply its gross receipts tax to 100% of the company's nationwide gross revenues, merely because the company's headquarters building was in the city. 471 S.E.2d at 496, 498. The company operated 24 facilities in 13 different states, including manufacturing plants, distribution centers, and service and

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[17] There is no suggestion whatsoever in either *American Woodmark* or *M & Assocs.* that *Jefferson Lines* undermined this Court's apportionment holding in *Tyler Pipe*.

sales offices. None of those facilities were located in the city and almost none of the company's customers were either. *Id.*

Similarly, in *M & Assocs.*, the city attempted to apply its gross receipts tax to all the company's receipts from sales, including sales in other states, again merely because the company's headquarters building was in the city. 723 So. 2d at 592-93. The Alabama court correctly held that the city's tax failed the "internal consistency" test. *Id.* at 598-99. Thus, the local gross receipts taxes in *American Woodmark* and *M & Associates* truly were unapportioned.

In contrast, the selling B&O taxes this Court upheld in *Tyler Pipe* are inherently apportioned because they are imposed only on sales in Washington. No other state could constitutionally impose a similar gross receipts tax on the same sales. *See, e.g., Evco v. Jones*, 409 U.S. 91 (1972); *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938). Washington's selling B&O taxes obviously are internally consistent and are fairly apportioned.

In short, neither of the Commerce Clause apportionment questions presented by petitioners is a substantial federal question.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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August 30, 1999

1987 WASH. LAWS, 2ND EX. SESS. CH. 3

BUSINESS AND OCCUPATION TAX– MULTIPLE ACTIVITIES–TAX CREDITS

AN ACT Relating to business and occupation taxation of multiple activities; amending RCW 82.04.440; creating new sections; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. The legislature finds that the invalidation of the multiple activities exemption contained in RCW 82.04.440 by the United States Supreme Court now requires adjustments to the state's business and occupation tax to achieve constitutional equality between Washington taxpayers who have conducted and will continue to conduct business in interstate and intrastate commerce. It is the intent of this act to preserve the integrity of Washington's business and occupation tax system and impose only that financial burden upon the state necessary to establish parity in taxation between such taxpayers.

Thus, this act extends the system of credits originated in RCW 82.04.440 in 1985 to provide for equal treatment of taxpayers engaging in extracting, manufacturing or selling regardless of the location in which any of such activities occurs. It is further intended that RCW 82.04.440, as amended by section 2 of this act, shall be construed and applied in a manner that will eliminate unconstitutional discrimination between taxpayers and ensure the preservation and collection of revenues from the conduct of multiple activities in which taxpayers in this state may engage.

Sec. 2. Section 82.04.440, chapter 15, Laws of 1961 as last amended by section 1, chapter 190, Laws of 1985 and RCW 82.04.440 are each amended to read as follows:

(1) ((~~Except as provided in subsections (2) and (3) of this section,~~)) Every person engaged in activities which are

within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in.

(2) Persons taxable under RCW 82.04.250 or 82.04.270 shall ((~~not be taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing of the products so sold~~)) be allowed a credit against those taxes for any (a) manufacturing taxes paid with respect to the manufacturing of products so sold in this state, and/or (b) extracting taxes paid with respect to the extracting of products so sold in this state or ingredients of products so sold in this state. Extracting taxes taken as credit under section (3) of this section may also be taken under this subsection, if otherwise allowable under this subsection. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the sale of those products.

(3) Persons taxable under RCW 82.04.240 or 82.04.260 subsection (4) shall ((~~not be taxable under RCW 82.04.230~~)) be allowed a credit against those taxes for any extracting taxes paid with respect to extracting the ingredients of the products so manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the manufacturing of those products.

(4)(((~~(a) If it is determined by a court of competent jurisdiction, in a judgment not subject to review, that subsection (2) of this section results in an unconstitutional discrimination against interstate or foreign commerce, and that relief is appropriate for any tax reporting periods either before or after April 30, 1985, it is the intent of the legislature that the credit provided in (b) of this subsection shall be applied to such reporting periods and that relief for such periods be limited to the granting of such credit. It is further the intent of the legislature that such credit shall be applicable only under the conditions and to the extent provided in this subsection (4):~~

~~(b) As provided in (a) of this subsection,~~)) Persons taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing products in this state shall be allowed a credit against those taxes for any (i) gross receipts taxes paid to another state with respect to the sales of the products so extracted or manufactured in this state, (ii) manufacturing taxes paid with respect to the manufacturing of products using ingredients so extracted in this state, or (iii) manufacturing taxes paid with respect to manufacturing activities completed in another state for products so manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the extraction or manufacturing of those products.

(((~~(c)~~))) (5) For the purpose of this ((~~subsection,~~)) section:

(a) "Gross receipts tax" means a tax:

(i) Which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which the deductions allowed would not constitute the tax an income tax or value added tax, and

(ii) Which is also not, pursuant to law or custom, separately stated from the sales price.

(((~~(d) For the purpose of this subsection,~~))) (b) "State" means (i) the state of Washington, (ii) a state of the United States other than Washington, or any political subdivision ((~~thereof, or~~)) of such other state, (iii) the District of Columbia, and (iv) any foreign country or political subdivision thereof.

(c) "Manufacturing tax" means a gross receipts tax imposed on the act or privilege of engaging in business as a manufacturer, and includes (i) the taxes imposed in RCW 82.04.240 and subsections (2), (3), (4), (5), and (7) of RCW 82.04.260, and (ii) similar gross receipts taxes paid to other states.

(d) "Extracting tax" means a gross receipts tax imposed on the act or privilege of engaging in business as an extractor, and includes the tax imposed in RCW 82.04.230 and similar gross receipts taxes paid to other states.

(e) "Business", "manufacturer", "extractor", and other terms used in this section have the meanings given in RCW 82.04.020 through 82.04.212, notwithstanding the use of those terms in the context of describing taxes imposed by other states.

NEW SECTION. Sec. 3. If it is determined by a court of competent jurisdiction, in a judgment not subject to review, that relief is appropriate for any tax reporting periods before the effective date of this act, in respect to RCW 82.04.440 as it existed before the effective date of this act, it is the intent of the legislature that the credits provided in RCW 82.04.440 as amended by section 2 of this act shall be applied to such reporting periods and that relief for such periods be limited to the granting of such credits.

NEW SECTION. Sec. 4. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 5. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the Senate August 10, 1987.

Pass the House August 10, 1987.

Approved by the Governor August 11, 1987.

Filed in Office of Secretary of State August 11, 1987.

1985 WASH. LAWS CH. 190

BUSINESS AND OCCUPATION TAX—CREDIT FOR TAXES PAID TO ANOTHER STATE FOR SALES OF PRODUCTS EXTRACTED OR MANUFACTURED IN-STATE

AN ACT Relating to revenue and taxation; amending RCW 82.04.440, 82.49.010, and 82.49.030; adding a new section to chapter 82.12 RCW; adding a new section to chapter 82.49 RCW; creating a new section; repealing RCW 82.49.040, 82.49.050, and 82.49.060; providing an effective date; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. Section 82.04.440, chapter 15, Laws of 1961 as last amended by section 5, chapter 172, Laws of 1981 and RCW 82.04.440 are each amended to read as follows:

(1) Except as provided in subsections (2) and (3) of this section, every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in((: ~~PROVIDED, That~~)).

(2) Persons taxable under RCW 82.04.250 or 82.04.270 shall not be taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing of the products so sold ((~~, and that~~)).

(3) Persons taxable under RCW 82.04.240 or ((~~RCW~~)) 82.04.260 subsection (4) shall not be taxable under RCW 82.04.230 with respect to extracting the ingredients of the products so manufactured.

(4)(a) If it is determined by a court of competent jurisdiction, in a judgment not subject to review, that

subsection (2) of this section results in an unconstitutional discrimination against interstate or foreign commerce, and that relief is appropriate for any tax reporting periods either before or after the effective date of this 1985 act, it is the intent of the legislature that the credit provided in (b) of this subsection shall be applied to such reporting periods and that relief for such periods be limited to the granting of such credit. It is further the intent of the legislature that such credit shall be applicable only under the conditions and to the extent provided in this subsection (4).

(b) As provided in (a) of this subsection, a person taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing products in this state shall be allowed a credit against those taxes for any gross receipts taxes paid to another state with respect to the sales of the products so extracted or manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the extraction or manufacturing of those products.

(c) For the purpose of this subsection, "gross receipts tax" means a tax:

(i) Which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which the deductions allowed would not constitute the tax an income tax or value added tax; and

(ii) Which is also not, pursuant to law or custom, separately stated from the sales price.

(d) For the purpose of this subsection, "state" means state of the United States, any political subdivision thereof, or the District of Columbia, and any foreign country or political subdivision thereof.

NEW SECTION. Sec. 8. If any provision of this act or its application to any person or circumstance is held invalid,

the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 9. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the Senate April 28, 1985.

Passed the House April 28, 1985.

Approved by the Governor April 30, 1985, with the exception of certain items which are vetoed.

Filed in Office of Secretary of State April 30, 1985.

WAC 458-20-19301 Multiple activities tax credits. (1) Introduction. Under the provisions of RCW 82.04.440 as amended effective August 12, 1987, Washington state's business and occupation taxes imposed under chapter 82.04 RCW were adjusted to achieve constitutional equality in the tax treatment of persons engaged in intrastate commerce (within this state only) and interstate commerce (between Washington and other states). The business and occupation tax system taxes the privilege of engaging in specified business activities based upon "gross proceeds of sales" (RCW 82.04.070) and the "value of products" (RCW 82.04.450) produced in this state. In order to maintain the integrity of this taxing system, to eliminate the possibility of discrimination between taxpayers, and to provide equal and uniform treatment of persons engaged in extracting, manufacturing, and/or selling activities regardless of where performed, a statutory system of internal and external tax credits was adopted, effective August 12, 1987. This tax credits system replaces the multiple activities exemption which, formerly, assured that the gross receipts tax would be paid only once by persons engaged in more than one taxable activity in this state in connection with the same end products. Unlike the multiple activities exemption which only prevented multiple taxation from within this state, the credits of the new system apply for gross receipts taxes paid to other taxing jurisdictions outside this state as well.

(2) Definitions. For purposes of this section the following terms will apply.

(a) "Credits" means the multiple activities tax credit(s) authorized under this statutory system also referred to as MATC.

(b) "Gross receipts tax" means a tax:

(i) Which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which the deductions allowed

would not constitute the tax an income tax or value added tax; and

(ii) Which is not, pursuant to law or custom, separately stated from the selling price.

(c) "Extracting tax" means a gross receipts tax imposed on the act or privilege of engaging in business as an extractor, and includes the tax imposed by RCW 82.04.230 (tax on extractors) and similar gross receipts taxes paid to other states.

(d) "Manufacturing tax" means a gross receipts tax imposed on the act or privilege of engaging in business as a manufacturer, and includes:

(i) The taxes imposed in RCW 82.04.240 (tax on manufacturers) and subsections (2) through (5) and (7) of RCW 82.04.260 (tax on special manufacturing activities) and

(ii) Similar gross receipts taxes paid to other states.

The term "manufacturing tax," by nature, includes a gross receipts tax upon the combination of printing and publishing activities when performed by the same person.

(e) "Selling tax" means a gross receipts tax imposed on the act or privilege of engaging in business as a wholesaler or retailer of tangible personal property in this state or any other state. The term "selling" has its common and ordinary meaning and includes the acts of making either wholesale sales or retail sales or both.

(f) "State" means:

(i) The state of Washington,

(ii) A state of the United States other than Washington or any political subdivision of such other state,

(iii) The District of Columbia,

(iv) Territories and possessions of the United States, and

(v) Any foreign country or political subdivision thereof.

(g) "Taxes paid" means taxes legally imposed and actually paid in terms of money, credits, or other emoluments to a taxing authority of any "state." The term does not include taxes for which liability for payment has accrued but for which payment has not actually been made. This term also includes business and occupation taxes being paid to Washington state together with the same combined excise tax return upon which MATC are taken.

(h) "Business," "manufacturer," "extractor," and other terms expressly defined in RCW 82.04.020 through 82.04.212 have the meanings given in those statutory sections regardless of how the terms may be used for other states' taxing purposes.

(3) Scope of credits. This integrated tax credits system is intended to assure that gross receipts from sales or the value of products determined by such gross receipts are taxed only one time, whether the activities occur entirely within this state or both within and outside this state. External tax credits arise when activities are taxed in this state and similar activities with respect to the same products produced and sold are also subject to similar taxes outside this state. There are five ways in which external tax credits may arise because of taxes paid in other states.

(a) Products or ingredients are extracted (taken from the ground) in this state and are manufactured or sold and delivered in another state which imposes a gross receipts tax on the latter activity(s). The credit created by payment of the other state's tax may be used to offset the Washington extracting tax liability.

(b) Products are manufactured, in whole or in part, in this state and sold and delivered in another state which imposes a gross receipts tax on the selling activity. Again, payment of the other state's tax may be taken as a credit against the Washington manufacturing tax liability.

(c) Conversely, products or ingredients are extracted outside this state upon which a gross receipts tax is paid in the state of extracting, and which are sold and delivered to buyers here. The other state tax payment may be taken as a credit against Washington's selling taxes.

(d) Similarly, products are manufactured, in whole or in part outside this state and sold and delivered to buyers here. Any other state's gross receipts tax on manufacturing may be taken as a credit against Washington's selling tax.

(e) Products are partly manufactured in this state and partly in another state and are sold and delivered here or in another state. The combination of all other states' gross receipts taxes paid may be taken as credits against Washington's manufacturing and/or selling taxes.

Thus, the external tax credits may arise in the flow of commerce, either upstream or downstream from the taxable activity in this state, or both. Products extracted in another state, manufactured in Washington state, and sold and delivered in a third state may derive credits for taxes paid on both of the out of state activities.

Internal tax credits arise from multiple business activities performed entirely within this state, all of which are now subject to tax, but with the integrated credits offsetting the liabilities so that tax is only paid once on gross receipts. Under this system Washington extractors and manufacturers who sell their products in this state at wholesale and/or retail must report the value of products or gross receipts under each applicable tax classification. Credits may then be taken in the amount of the extracting and/or manufacturing tax paid to offset the selling taxes due. There are three ways in which credits may arise because of taxes paid exclusively in this state.

(f) Products are extracted in Washington and directly sold in Washington. Extracting business and occupation tax and selling business and occupation tax must both be reported but the payment of the former is a credit against the latter.

(g) Similarly, ingredients are extracted in Washington and manufactured into new products in this state. The extracting business and occupation tax reported and paid may be taken as a credit against manufacturing tax reported.

(h) Products manufactured in Washington are sold in Washington. Again, the payment of the manufacturing tax reported may be credited against the selling tax (wholesaling and/or retailing business and occupation tax) reported.

All of the external and internal tax credits derived from any flow of commerce may be used, repeatedly if necessary, to offset other tax liabilities related to the production and sale of the same products.

(4) Eligibility for taking credits. Statutory law places the following eligibility requirements and limitations upon the MATC system.

(a) The amount of the credit(s), however derived, may not exceed the Washington tax liability against which the credit(s) may be used. Any excess of credit(s) over liability may not be carried over or used for any purpose.

(b) The person claiming the credit(s) must be the same person who is legally obligated to pay both the taxes which give rise to the credit(s) and the taxes against which the credit is claimed. The MATC is not assignable.

(c) The taxes which give rise to the credit(s) must be actually paid before credit may be claimed against any other tax liability. Tax liability merely accrued is not creditable.

(d) The business activity subject to tax, and against which credit(s) is claimed, must involve the same ingredients or product upon which the tax giving rise to the credit(s) was paid. The credits must be product-specific.

(e) The effective date for developing and claiming credit(s) for products manufactured in Washington state and sold and delivered in other states which impose gross receipts selling taxes is June 1, 1987.

(f) The effective date for developing and claiming all credits other than those explained in subsection (e) above, is August 12, 1987.

(g) Persons who are engaged only in making wholesale or retail sales of tangible personal property which they have not extracted or manufactured are not entitled to claim MATC. Also, persons engaged in rendering services in this state are not so entitled, even if such services have been defined as "retail sales" under RCW 82.04.050. (See WAC 458-20-194 for rules governing apportionment of gross receipts from interstate services.)

(5) Other states' qualifying taxes. The law defines "gross receipts tax" paid to other states to exclude income taxes, value added taxes, retail sales taxes, use taxes, or other taxes which are generally stated separately from the selling price of products sold. Only those taxes imposed by other states which include gross receipts of a business activity within their measure or base are qualified for these credit(s). The burden rests with the person claiming any MATC for other states' taxes paid to show that the other states' tax was a tax on gross receipts as defined herein. Gross receipts taxes generally include:

(a) Business and occupation privileges taxes upon extracting, manufacturing, and selling activities which are similar to those imposed in Washington state in that the tax measure or base is not reduced by any allocation, apportionment, or other formulary method resulting in a downward adjustment of the tax base. If costs of doing business may be generally or routinely deducted from the tax base, the tax is not one which is similar to Washington state's gross receipts tax.

(b) Severance taxes measured by the selling price of the ingredients or products severed (oil, logs, minerals, natural products, etc.) rather than measured by costs of production, stumpage values, the volume or number of units produced, or some other formulary tax base.

(c) Business franchise or licensing taxes measured by the gross volume of business in terms of gross receipts or other financial terms rather than units of production or the volume of units sold.

Other states' tax payments claimed for MATC must be identifiable with the same ingredients or products which incurred tax liability in Washington state, i.e., they must be product specific.

(d) The department will periodically publish an excise tax bulletin listing current taxes in other jurisdictions which are either qualified or disqualified for credit under the MATC system.

(6) Deductions in combination with MATC. Effective August 12, 1987, with the enactment of the MATC system, the liability for actual payment of tax by persons who extract, manufacture, and sell products in this state was shifted from the selling activity (wholesaling or retailing) to the production activity (extracting and/or manufacturing). As explained, the payment of the production taxes may now be credited against the liability for selling taxes on the same products. However, the deductions from tax provided by chapter 82.04 RCW (business and occupation tax deductions) may still be taken before tax credits are computed and used, with noted exceptions. In order for the MATC system to result in the correct computation of tax liabilities and credit applications, the tax deductions which may apply for any reporting period must be taken equally against both levels of tax liability reported, i.e., at both the production and selling levels. Failure to report tax deductions in this manner will result in overreporting tax due and may result in overpayment of tax. Thus, with the exceptions noted below, tax deductions formerly reported only against selling activities should now be reported against production activities as well. All such deductions, the result of which is to reduce the measure of tax reported, should be taken against both the production taxes (extracting or

manufacturing) and the selling taxes (wholesaling and/or retailing equally.

(a) Example:

(i) A company manufactures products in Washington which it also sells at wholesale for $5,000 and delivers to a buyer in this state. The buyer defaults on part of the payment and the seller incurs a $2,000 credit loss which it writes off as a bad debt during the tax reporting period. The bad debt deduction provided by RCW 82.04.4284 must be shown on both the manufacturing-other line and the wholesaling-other line of the combined excise tax return. Taking the deduction on only one of those activities results in overreported tax liability on the $2,000 loss.

(b) Exceptions. The deductions generally provided by RCW 82.04.4286, for interstate or foreign sales (where goods are sold and delivered outside this state) may not be taken against tax reported at the production level (extracting or manufacturing). This is because the MATC system itself provides for tax credits instead of tax deductions on gross receipts from transactions involving goods produced in this state and sold in interstate or foreign commerce. Thus, deductions which eliminate transactions from tax reporting may be taken only against selling taxes.

(c) Applicable deductions should be shown on the front of the combined excise tax return (Column #3) on each applicable tax classification line and detailed on the back side of the return, as usual, before MATC is taken.

(d) It is not the intent of the MATC law to invalidate or nullify the business and occupation tax exemption for taxable amounts below minimum (see WAC 458-20-104). Thus any person whose gross receipts or value of products reported under any single tax classification with respect to the production and sale of any product is less than the minimum taxable amount will not incur tax liability merely because of the requirement to report those gross receipts or value of

products on the same product under other tax classifications as well.

(i) Example: A person both manufactures and sells at wholesale $2,000 worth of widgets in the first quarter of a tax year. The requirement to report the $2,000 tax measure under both the manufacturing-other classification and the wholesaling-other classification gives the false appearance of $4,000 in gross receipts during this quarter. However, only the amount reported under the manufacturing-other classification need be considered to determine eligibility for the amount-below-minimum exemption.

(7) How and when to take MATC. The credits available under the MATC system are all to be taken on the combined excise tax return beginning in August, 1987 and thereafter. The return form has been modified to accommodate these credits. Each tax return upon which MATC has been taken must be accompanied by a completed Schedule C. This schedule details the business activities and credits computations. The line by line instructions insure that no more or no less credits are claimed than are authorized under the law.

(8) Consolidation of tax liabilities and credits. Under the MATC system a person's Washington tax liability for all activities involved in that person's production and sale of the same ingredients or products (extracting, and/or manufacturing, and/or selling) is to be reported only at the time of the sale of such products or at the time of that person's own use of such products for commercial or industrial consumption. All of the taxable activities are to be reported on that same periodic excise tax return. Also, all external and internal tax credits derived from the payment of any gross receipts taxes on any of these activities are to be taken at that time. Thus, the taxable activities and the tax credits are procedurally consolidated for reporting. This consolidation generally overcomes any need to track ingredients or products from their extraction to their sale. It also overcomes any need to report and pay Washington tax liability during one reporting period and to take credits against

that tax liability in a different reporting period. Thus, except as noted below, there can be no credit carryovers or carrybacks under this system.

(a) Exception. Where different tax periods are assigned by Washington state and another state to a company doing business both within and outside Washington state, the other state's gross receipts tax on the same products may not yet have been paid when the Washington tax is due for reporting and payment. In such cases the Washington tax due must be timely reported and paid during the period in which the sale is made. The external credit arising later, when the other state's tax is paid, may be taken as a credit against any Washington business and occupation tax reported during that later period. Thus, the limitation that the MATC must be product-specific by being limited to the amount of Washington tax paid on the same products does not mean that the credit(s) can only be used against precisely those same Washington taxes paid.

(i) In the situation described in subsection (a) above, if there is not sufficient Washington business and occupation tax due for payment in the later period, when the external tax credit arises, to allow for utilization of the entire credit, the amount of any overage may be carried forward and taken against Washington taxes reported in subsequent reporting periods until fully used.

When filing such exception returns, the full amount of any credits should be claimed, even though that credit amount will exceed the amount of tax liability reported for that period. The department of revenue itself will make the necessary adjustments and will perform the carrying over of any excess credits into future reporting periods.

(ii) In the same situation, if the person entitled to claim such credit overage is no longer engaged in taxable business in this state or for any other reason does not incur sufficient Washington business and occupation tax liability to fully utilize the perfected credit overage, a tax refund will be issued.

(iii) No tax refunds, MATC carryovers, or MATC carrybacks will be allowed under any circumstances other than those explained above.

(b) Special circumstances may arise where it is not possible to specifically identify ingredients or products as they move from production to sale (e.g., fungible commodities from various sources stored in a common warehouse). In such cases the taxpayer should seek advance approval from the department, in writing, for tax reporting and credit taking on a test period, formulary, or volume percentage basis, subject to audit verification.

(9) Recordkeeping requirements. Persons claiming the MATC must keep and preserve such records and documents as may be necessary to prove their entitlement to any credits taken under this system (RCW 82.32.070). It is not required to submit copies of such proofs when credits are claimed or together with the Schedule C detail. Rather, such records must be kept for a period no less than five years from the date of the tax return upon which the related tax credits are claimed. Such records are fully subject to audit for confirmation of the validity and amounts of credits taken. Records which must be preserved by persons claiming external tax credits include:

(a) Copies of sales contracts, or other written or memorialized evidence of any sales agreements, including purchase and billing invoices showing the origin state and destination state of products sold.

(b) Copies of shipping or other delivery documents identifying the products sold and delivered, reconcilable with the selling documents of subsection (a) above, if appropriate.

(c) Copies of production reports, transfer orders, and similar such documents which will reflect the intercompany or interdepartmental movement of extracted ingredients or manufactured products where no sale has occurred.

(d) Copies of tax returns or reports filed with other states' taxing authorities showing the kinds and amounts of taxes paid to such other states for which MATC is claimed.

(e) Copies of cancelled checks or other proofs of actual tax payment to the other state(s) giving rise to the MATC claimed.

(f) Copies of any other state(s) taxing statutes, laws, ordinances, and other appropriate legal authorities necessary to establish the nature of the other states' tax as a gross receipts tax, as defined in this section.

(g) Failure to keep and preserve proofs of entitlement to the MATC will result in the denial of credits claimed and the assessment of all taxes offset or reduced by such credits as well as the additional assessment of interest and penalties as required by law. (See RCW 82.32.050.)

(10) MATC in combination with other credits. The tax credits authorized under this system may be taken in combination with other tax credits available under Washington law. Such other credit programs, however, authorize credit carryovers from reporting period to period until the credits are fully utilized. Thus, the MATC must be computed and used to offset business and occupation tax liabilities during any tax reporting period before any other program credits to which a claimant may be entitled are claimed or applied. Failure to compute and take the MATC before applying other available credits may result in the loss of the other credit benefits.

(11) Superseding provisions. The MATC provisions of this section supersede and control the provisions of other sections of chapter 458-20 WAC (other tax rules) relating to intrastate, interstate, and foreign transactions to the extent that such provisions are or appear to be contrary or conflicting.

(12) Unique or special credit situations-Appeals. The provisions of this section generally explain the nature of the MATC system and the tax credit qualifications, limitations, and claiming procedures. The complexity of the integrated tax

reporting and credit taking procedures may develop situations or questions which are not addressed herein. Such matters and requests for specialized rulings should be submitted to the department of revenue for prior determination before credits are claimed. Generally, prior determinations will be provided within sixty days after the department receives the information necessary to make such a ruling. Adverse rulings, tax credit denials, or tax assessments resulting from audits or other examinations of returns upon which the MATC is claimed may be administratively appealed under the provisions of chapter 82.32 RCW and WAC 458-20-100.

PETITIONERS THAT LITIGATED IN *TYLER PIPE INDUS., INC. V. WASHINGTON DEP'T OF REV.*, 483 U.S. 232 (1987) WHETHER THE B&O TAXES ON THEIR SELLING ACTIVITIES IN WASHINGTON WERE FAIRLY APPORTIONED.

Allis-Chalmers Corp.
American Cyanamid Co.
American National Can Co.*
Bethlehem Steel Corp.
Chrysler Motors Corp.
Clark Equipment Co.
Ford Motor Co.
G. Heileman Brewing Co.
Honeywell, Inc.
International Paper Co.
Kal Kan, Inc.
Longview Fibre Co.
Mars, Inc.
Reynolds Metals Co.
Scott Paper Co.
Shulton, Inc.
Square D Co.
Uncle Ben's, Inc.
W. R. Grace & Co.
Westinghouse Electric Corp.
Xerox Corp.

*American National Can Co. was formerly known as National Can Corp.

PETITIONERS THAT LITIGATED IN *AMERICAN NAT'L CAN CORP. V. DEPARTMENT OF REV.*, 114 WASH. 2D 236, 787 P.2D 545, *CERT. DENIED*, 498 U.S. 880 (1990) WHETHER THE 1987 TWO-WAY, CREDIT LAW DISCRIMINATES AGAINST INTERSTATE COMMERCE.

Alpac Corp.
American Cyanamid Co.
American National Can Co.
American Passage Marketing Corp.
Anheuser-Busch, Inc.
Apple Computer, Inc.
Bandag, Inc.
Basic American Foods
Bridgestone (U.S.A.), Inc.
Bridgestone/Firestone, Inc.
Brown & Williamson Tobacco Co.
Chrysler Motors Corp.
Clark Equipment Co.
Cooper Industries, Inc.
Cooper Power Systems, Inc.
Down River Forest Products, Inc.
E.I. du Pont de Nemours & Co., Inc.
Eastman Kodak Co.
Edison International, Inc.
Ford Motor Co.
Gerber Food Products Co.
Gerber Products Co.
George A. Hormel & Co.
Herman Miller, Inc.
Hewlett-Packard Co.
Honeywell, Inc.
Hygrade Food Products Corp.
International Paper Co.
Kal Can Foods, Inc.
Kimberly-Clark Corp.
Longview Fibre Co.
Mars, Inc.
McGraw Edison Co. (Area Lighting Division)
McGraw Edison Co. (Bussmann Division)
McGraw Edison Company (Halo Lighting Division)
The Mead Corp.
Murray Pacific Corp.

Noel Canning Corp.
Outboard Marine Corp.
Owens-Corning Fibreglas Corp.
Quinton Investment Co.
Remington Arms Co., Inc.
Reynolds Metals Co.
Scott Paper Co.
Seattle FilmWorks, Inc.
Shields Bag & Printing Co.
Shulton, Inc.
Square D Co.
Sun Sportswear, Inc.
Tektronix, Inc.
Uncle Ben's, Inc.
Welch Foods, Inc.
Western Bottling Co., Inc.
Westinghouse Electric Corp.
W.R. Grace & Co.
Xerox Corp.

IN THE SUPERIOR COURT OF THE STATE
OF WASHINGTON
FOR THURSTON COUNTY

AMERICAN NATIONAL CAN CORPORATION, et al.,	)	
Plaintiffs,	)	NO. 88-2-00680-3
vs.	)	
STATE OF WASHINGTON, DEPARTMENT OF REVENUE, and WILLIAM R. WILKERSON,	)	AFFIDAVIT OF FRED DANG IN RESPECT TO DETERMINATION OF MULTIPLE TAX CREDIT
Defendants.	)	
STATE OF WASHINGTON	)	
	)	ss.
County of Thurston	)	

FRED DANG, having been first duly sworn on oath, deposes and says:

1. I am a Revenue Auditor employed by the Washington State Department of Revenue and have served in that position during the times pertinent to this affidavit. I am over the age of eighteen, competent to testify in this matter, and have personal knowledge of all matters set forth in this affidavit.

2. In 1988 I conducted an excise tax audit of the plaintiff taxpayer identified under the terms of a protective order in this matter as No. 46. The audit of this taxpayer resulted from the Department of Revenue's usual audit

selection process and was conducted for the taxable periods January 1, 1984 through December 31, 1987.

3. During the course of audit I noted that no claim had been made by the taxpayer for the business and occupation multiple activities tax credit (MATC credit) for which the taxpayer might otherwise be eligible for the limited interval July 1, 1987 through December 31, 1987 included in my audit period.

4. In conducting the audit examination I determined that the taxpayer might be entitled to the MATC credit with respect to products manufactured within the state of Washington and which were subjected to selling gross receipts taxes in the states of Indiana and Hawaii.

5. For purposes of confirming the MATC credit allowable to the taxpayer I audited the existing records of the corporation as follows:

(a) I utilized a test period which contained portions of the months of October and November 1987.

(b) I then made reference to the taxpayer's existing records summarizing sales of manufactured products made into the various states including Indiana and Hawaii.

(c) From existing sales invoices and product numbers examined for the test period I determined that 54.65% of the product volume sold into Indiana was produced in Washington. I further determined that the comparable percentage for Hawaii sales from Washington manufacturing sources was 20.62%.

(d) I then calculated the Indiana and Hawaii taxes payable on this apportioned volume of sales within the two states from Washington sources, thereby producing the allowable MATC credit.

6. My audit was conducted by examining records compiled and maintained by the taxpayer for purposes other than the computation of the MATC credit. The MATC credit allowed for the Indiana tax as a result of my audit was $7,211. The credit was allowed for the period June through December 1987. On an annualized basis, this credit closely approximates

what the taxpayer has identified in paragraph 8 of its affidavit, which I have read, as its credit entitlement based upon a review of its "production, distribution and sales system" records. The MATC credit allowed for taxes paid to Hawaii, which are not mentioned in the taxpayer's affidavit, was $810.

/s/ Fred Dang
FRED DANG

SUBSCRIBED AND SWORN TO before me this 19th day of July, 1989.

/s/ LoRay W. Walker
NOTARY PUBLIC in and for the
State of Washington, residing
at Olympia.
My commission expires: 10-1-89

IN THE SUPERIOR COURT OF THE STATE
OF WASHINGTON
FOR THURSTON COUNTY

AMERICAN NATIONAL CAN CORPORATION, et al.,	)	
Plaintiffs,	)	NO. 88-2-00680-3
vs.	)	
STATE OF WASHINGTON, DEPARTMENT OF REVENUE, and WILLIAM R. WILKERSON,	)	AFFIDAVIT OF LES JASTER IN RESPECT TO THE MULTIPLE ACTIVITIES TAX CREDIT
Defendants.	)	
STATE OF WASHINGTON	)	
	)	ss.
County of Thurston	)	

LES JASTER, having been first duly sworn on oath deposes and says:

1. I am a regional audit manager of the Washington State Department of Revenue and previously served as the supervisor of Audit Review for such agency. I am over the age of eighteen, competent to testify in this matter, and have personal knowledge of all matters set forth in this affidavit.

2. I have been employed by the Department of Revenue for approximately twenty-one years.

3. My responsibilities in the position of regional audit manager and supervisor of Audit Review require that I provide advice and instructions to the agency's tax auditors in

the administration and application of the Washington multiple activities credit (hereinafter the "MATC credit") which is allowed as a credit against Washington business and occupation taxes for certain gross receipts taxes paid to other states and jurisdictions. These responsibilities include the giving of similar advice and instructions to auditors in regard to the application of the Department of Revenue's administrative rule (WAC 458-20-19301) which implements the statutory credit.

4. In connection with the above-referenced action I have recently examined affidavits submitted by several of the plaintiffs herein which are generally titled "Affidavit Regarding Potential Claim for the Washington Multiple Activities Credit". Because of the protective order obtained by plaintiffs I am required to identify the corporate taxpayers submitting these affidavits by number rather than by name. I am informed and therefore believe that the court has been provided with an index to identify these taxpayers. The taxpayer affidavits which I have reviewed are as follows;

Taxpayer Nos.	4	15	34	50	64
	10	17	39	52	67
	11	18	46	56	57
	12	23	49	59	72

I have also reviewed the initial affidavits submitted by these taxpayers with the exception of two taxpayers which did not submit such initial affidavits.

5. A substantial number of the affidavits contain the same language which states that based upon the taxpayers' analysis of their production, distribution and sales records they believe themselves to be eligible for MATC credits, in amounts they specifically state, for gross receipts taxes paid to other jurisdictions. Such affidavits, however, proceed to say that the requirements of the law, as administered by the Department of Revenue preclude their claim of the MATC credit because the costs of "identifying, producing and preserving" the documentation required by the Department of Revenue significantly exceed the financial benefit of the credit. Certain

of the affidavits allege, in conclusionary fashion and without detail, the costs that would be incurred in setting up a unique accounting system to be able to claim such credits.

6. The representations contained in these affidavits misconstrue the requirements of the law for claiming credits as the law is administered by the Department of Revenue.

7. The recordkeeping requirements set forth in the Department's administrative rule (WAC 458-20-19301) pertain to records that a taxpayer generates in the ordinary course of business. The rule does not require the independent generation of records for the sole purpose of establishing qualification for the MATC credit.

8. The affidavits submitted by taxpayers further imply that the Department requires the exact tracing of any and all manufactured items from their place of origin to destination before consideration will be given to allowance of tax credit. This is inaccurate.

9. Further, the affidavits suggest that by reference to the records maintained by the taxpayers in the ordinary course of business relating to their production, distribution and sales systems, the taxpayers could calculate an appropriate MATC credit, but the Department's recordkeeping requirements and methods of administering the tax credit would disallow the benefit. This, too, is in error.

10. The Department will utilize records otherwise maintained by the taxpayer which may permit the tracing of goods to determine the movement from point of manufacture or extraction to sale for purposes of confirming the allowable MATC credit. The Department will analyze such records for a given taxpayer agreed upon by the Department and the taxpayer (e.g., one or more months) and apply the results of that test period to the entire audit period.

11. However, where existing or readily obtainable records do not permit the identification of specific products from their places of origin to ultimate destination, the Department is prepared to accept statistical evidence

maintained in the ordinary course of business as confirmation of the taxpayers' entitlement to credit.

12. For example, a manufacturing business can demonstrate from records it otherwise maintains that 10% of the products it manufactures outside of Washington is attributable to jurisdictions that impose a gross receipts manufacturing tax that would qualify as a credit against the tax imposed for sales made to Washington customers. The taxpayer's records further demonstrate that of its total production outside Washington, 5% of the production is sold into Washington. The taxpayer neither generates nor maintains records in the ordinary course of business to establish from which manufacturing sources the Washington products emanated and in what amounts. In such circumstances the Department would deem 10% of the Washington products to have had their origin in that jurisdiction imposing the gross receipts manufacturing tax which may be used as a credit against Washington's selling tax.

13. The administration of the rule in this manner for purposes of the MATC credit is consistent with the adjustments the Department allows in certain comparable situations exemplified by the following:

(a) Bad Debts (RCW 82.04.4284). A company can demonstrate from its existing records that a given percentage of its accounts receivable on a nationwide basis results in bad debts. It can determine from such records what portion of its accounts are generated in Washington, but has no records to demonstrate the exact dollar amount of Washington bad debts. The Department will allow a deduction for bad debts computed by applying the nationwide percentage to the known Washington accounts.

(b) Manufactured and Purchased Products. A Washington manufacturer is required from time to time to supplement its manufactured products by purchasing the same products in order to fulfill its sales commitments. It makes sales within and outside of Washington. If such purchased products are used to fill out-of-state orders, the taxpayer has no

obligation for Washington's selling business and occupation tax. Conversely, a selling tax will be paid on sales made in-state. Correspondingly, manufacturing tax must be paid with respect to products manufactured within the state and used to fill out-of-state orders. The taxpayer maintains no records in the ordinary course of business which show what specific products sold within and outside the state are attributable to the manufacturing and purchasing activities. In the absence of such records, the Department will not disallow an exemption from tax for some part of the out-of-state sale orders which may, in fact, have been filled by purchased products but will deem that result to have taken place by apportioning out-of-state sales by reference to the taxpayer's records of total manufacturing and purchasing activity.

14. The administration of the MATC credit by the Department of Revenue in the manner described in ¶¶ 10-12 of this affidavit is exemplified by recent audits of two plaintiff taxpayers who have filed affidavits concerning the multiple activities credit (taxpayer Nos. 15 and 46). The court is referred to the affidavits of Robert M. Beith and Fred Dang, filed concurrently with this affidavit, which describe the audits of these two taxpayers respectively.

15. Such use of existing records for purposes of supporting and confirming the entitlement to the MATC credits will not in my judgment necessitate the creation of unique and elaborate accounting systems alleged by the taxpayers in their affidavits nor the generation of additional accounting records designed solely for the purposes of establishing entitlement to the credit.

16. Having noted the representations contained in the affidavits of the taxpayers identified in ¶ 4, to the best of my knowledge the Department of Revenue has not required a taxpayer, including any of the plaintiffs, to establish a claim for the MATC credit by the introduction of a new accounting system or the separate development of records which would

require the identification or tracking of specific manufactured or extracted products from their place of origin to destination.

/s/ Les Jaster
LES JASTER

SUBSCRIBED AND SWORN TO before me this 20th day of July, 1989.

/s/ LoRay W. Walker
NOTARY PUBLIC in and for the
State of Washington, residing
at Olympia.

My commission expires: 10-1-89

Supreme Court, U.S.
FILED
AUG 30 1999
OFFICE OF THE CLERK

(3)

No. 99-38

IN THE
Supreme Court of the United States

BUFFELEN WOODWORKING CO., *et al.*,
Petitioners,

v.

STATE OF WASHINGTON,
WASHINGTON DEPARTMENT OF REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

BRIEF OF *AMICUS CURIAE* COMMITTEE ON STATE TAXATION IN SUPPORT OF PETITIONERS

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IN THE

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STATE OF WASHINGTON,
WASHINGTON DEPARTMENT OF REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

BRIEF OF *AMICUS CURIAE* COMMITTEE ON STATE TAXATION IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

This brief is submitted by the Committee On State Taxation (COST) as *amicus curiae* in support of the Petitioners in the above captioned matter.[1] COST is submitting this brief because its members have expressed significant concern over the continued failure, as illustrated by this case, of state taxing authorities and state courts

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Written consents of the Petitioners and Respondent have been obtained and filed with the Clerk of the Court.

to provide constitutionally sufficient remedies to taxpayers for unconstitutional taxes.[2]

COST's objective is to preserve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. COST's membership consists of over 500 multistate corporations involved in interstate and international commerce. COST is a non-profit trade association that was organized in 1969 as an advisory committee to the Council of State Chambers of Commerce and was separately incorporated on January 1, 1992. Many of COST's members have business operations in the State of Washington and pay the Washington business and occupation tax. These members have pending refund claims or assessments in Washington awaiting a final determination as to whether Washington's proffered "remedy" meets due process standards. Thus, these members will be directly affected by a decision of this Court to review this case. Further, all of COST's members are involved from time to time in various constitutional challenges to state and local taxes which, when successful, require a remedy. Thus, all of COST's members are affected by the articulation of the requirements for a remedy to meet due process standards and by the states' willingness and ability to comply with these requirements.

As such, COST's members are directly affected by this case and have a strong interest in its outcome.

SUMMARY OF THE ARGUMENT

COST asks this Court to accept this case for review to determine whether a state remedy for an unconstitutional

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[2] COST is submitting a similar brief raising similar issues in support of the Petitioners in *W.R. Grace & Co.-Conn. and Chrysler Motors Corporation v. Washington Department of Revenue*, No. 99-31.

tax which retroactively imposes new and unexpected record keeping and proof requirements on the injured taxpayers is either a predeprivation remedy or "*meaningful* backward looking relief" and whether this new and unanticipated remedy imposed up to seven years after the tax was due and in lieu of all statutory remedies previously available is a "clear and certain" remedy. This Court should review this case for two reasons: 1) to prevent Washington, and by implication other states, from ignoring the constitutionally mandated standards for remedies of unconstitutional taxes; and 2) to articulate such a clear and unequivocal definition of what constitutes a sufficient remedy for an unconstitutional tax that both the states and taxpayers can fairly and uniformly apply that standard without significant further controversy.

This Court has already begun the process of defining what constitutes a constitutionally sufficient remedy for an unconstitutional tax. A taxpayer must be given either a predeprivation remedy or "meaningful backward looking relief," *McKesson Corp. v. Division of Alcoholic Bev. & Tobacco*, 496 U.S. 18 (1990) and the remedy must be "clear and certain," *Atchison, T. & S.F.R. Co. v. O'Conner*. 223 U.S. 280, 285 (1912). The meaning of the key terms of this constitutional standard—"meaningful" and "clear and certain"—must still be articulated. COST proposes that "meaningful" backward looking relief means that the taxpayer's injury is erased. COST further proposes that "clear and certain" means that the taxpayer knew of its available remedies at the time the unconstitutional tax was imposed. These standards are both violated in this case.

ARGUMENT

THE RETROACTIVE CREDIT OFFERED BY THE STATE OF WASHINGTON TO REMEDY AN UNCONSTITUTIONAL TAX VIOLATES THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION BECAUSE THE REMEDY IS NEITHER *MEANINGFUL* NOR *CLEAR AND CERTAIN.*

It is not hyperbole to state that the issue of remedies for unconstitutional taxes is the single most important issue in state and local tax today. States continue to impose unconstitutional taxes and when a court ultimately invalidates these taxes, many states nevertheless refuse to provide the taxpayer with constitutionally sufficient relief. This situation is a source of significant frustration [3] to taxpayers and this Court is the only forum in which a solution is available.

History of the Unconstitutional Tax to be Remedied

Washington imposes a business and occupation tax ("B&O" tax) on companies manufacturing items in the state and a separate B&O tax on companies selling items in the state. However, under Washington's original system, a company both manufactured and sold items in the state, it paid only the manufacturing tax (and was exempt from the selling tax). This system was ruled unconstitutional under the Commerce Clause in 1948 because it discriminated against companies who manufactured items in other states but sold the items in Washington. *Colum-*

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[3] The lack of adequate remedies has become somewhat of a depressing joke at taxpayer gatherings. Some taxpayers, after years of ultimately successful litigation challenging a tax have taken to cynically waving a dollar bill in the air and commenting that they have not received even one dollar in refunds from the suit. This is a sad commentary on the current system.

bia Steel Co. v. State, 192 P.2d 976 (Wash. 1948). The tax was unconstitutional because local manufacturers were exempt from the selling tax but out-of-state manufacturers were not.

Faced with an unconstitutional tax, Washington merely reversed the exemption rules. Under the new system, companies that sold items in the state were exempt from the manufacturing tax on items they manufactured and sold in the state. Wash. Rev. Code § 82.04.440(2). Companies who only manufactured items in the state but sold them in other states, continued to be subject to tax on their manufacturing activities.

In 1987, this Court ruled this second tax scheme unconstitutional for the same reason that the first scheme was invalidated. *Tyler Pipe Industries, Inc. v. State Dep't of Revenue*, 483 U.S. 232 (1987). As before, the new tax system discriminated against taxpayers who performed only one activity in Washington. *Id.* at 253.

Washington, still unwilling to overhaul its tax system, instead tacked on a credit mechanism in an attempt to make its B&O tax constitutionally acceptable. Wash. Rev. Code § 82.04.440. Under the new credit provision, if a company paid a B&O tax on either manufacturing or selling in a state other than Washington, it could receive a credit against its Washington tax for the other activity—if the other state's tax was substantially identical to Washington's tax and was imposed on the same goods that were also subjected to Washington's tax. Essentially, the credit mechanism is hollow since the income, franchise, and sales taxes that most states impose on manufacturers are disqualified from Washington's credit. The legislation creating the credit was effective August 12, 1987. 1987 Wash. Laws, 2d Ex. Sess., ch. 3 § 2. Washington applied this credit system retroactively, asserting

that the credit was the only remedy for tax declared unconstitutional in 1987. It is this retroactive and exclusive imposition of the credit that is at issue here.

Standards for Determining a Constitutional Remedy

A remedy to a tax declared unconstitutional must comply with the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[4] *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 100 (1992). Under the Due Process Clause, a remedy is constitutional only if it meets two tests: 1) the state must provide either a predeprivation remedy or "meaningful backward looking relief." *id.*; and 2) the remedy must be "clear and certain." *Atchison, T. & S.F.R. Co.*, 223 U.S. at 285. The remedy at issue here, ostensible credits imposing additional substantive and procedural requirements years after the tax in question was incurred, meets neither of these requirements.

The credit does not provide an adequate predeprivation remedy or "meaningful backward looking relief" because the record keeping requirements and the narrow interpretation of a tax qualifying for the credit make the credit an illusion rather than a real remedy. The Taxpayers' Petition for Writ of Certiorari ("Taxpayers' Petition") fully discusses the issue (Buffelen Brief pp. 12-17, Grace/Chrysler Brief pp. 8-16), and COST will not repeat the explanation other than to support the Taxpayers' position and to emphasize the importance of this issue to the taxpaying community.

Taxpayers should not be expected to anticipate all of the possible remedies a tax authority might create after the tax authority has lost the battle to legitimatize an un-

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[4] [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . . U.S. Const. amend. XIV, § 1.

constitutional tax. Record keeping, like that required in this case, is a very expensive and time consuming process, and is unnecessary for any business purpose of most companies. This case, whether accepted by this Court or not, sets the standard for taxpayer expectations. If this case is not accepted and reversed, then the "anything goes" attitude of the Washington Department of Renevue will be the standard. At best, taxpayers will be forced to choose between anticipating all of the possible remedies years before the constitutionality of a tax is finally decided (including preparing records and conforming business activities to comply with all possible future scenarios) or deciding to give up on a possible remedy because the cost of anticipatory preparation is too high. Realistically, a taxpayer will never be able to anticipate *all* possible remedies a state could devise and, thus, will frequently be left without any recourse. None of these alternatives supports a fair and equitable tax system governed by the standards of due process. Accordingly, Washington's determination of what constitutes a constitutional remedy should be reviewed and reversed.

The credit also does not provide a "clear and certain" remedy because the credit was not available at the time the tax was incurred and retroactively replaces remedies that were and, according to Washington's statutes, are still provided by statute to the taxpayers. *McKesson Corp.*, 496 U.S. at 39 n.22 (1990). To be "clear and certain," a remedy must, at a minimum be a remedy that the taxpayer was aware of at the time it decided to pay the tax (rather than take some other course of action). The terms "clear and certain" indicate that the remedies are specifically defined and guaranteed. Absent such simple notice a remedy cannot be clear and certain.[5] Wash-

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[5] COST is not addressing whether states could offer a constitu-constitutionally adequate credit as a remedy, rather than a refund,

ington's credit system runs afoul of this standard, and thus for this reason also, Washington's decision should be reviewed and reversed.

Finally, the remedy provided by Washington actually violates one of the clear standards already articulated by this Court—a state may not "bait and switch" in applying a remedy. *Reich v. Collins,* 513 U.S. 106 (1994). In *Reich v. Collins,* the taxpayer challenged the constitutionality of a state tax under a statutory refund provision. *Id.* The state tax code provided for both predeprivation challenges (protests) and post-deprivation challenges (refund suits). After the tax was ruled unconstitutional, the state tried to avoid paying the refund by arguing that since the taxpayer could have challenged the tax before paying the tax, the taxpayer had paid the tax voluntarily and no refund was due. *Id.* at 110. This Court soundly rejected this argument. *Id.* at 111. "Bait and switch" in the consumer protection world occurs when a company advertises a product, such as a television, for a very low price in order to entice a customer to enter the store. Once in the store, the customer is told that the store does not have that product but is offered a similar but different product for a more expensive price. Frequently, because the customer is already at the store and is prepared to make a purchase, the customer will buy the substitute and the store will make a higher profit than it would have made on the advertised product. This is just what Washington did here: it offered injunctive and refund relief for illegal taxes (Wash. Rev. Code §§ 82.32.150; 82.32.180), but when the taxpayers came to court to obtain the advertised remedy, the state said, "we won't provide the statutory relief, but what we can offer

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but only suggests that this remedy must be apparent at the time the tax was paid by the taxpayer.

you are these new, costly credits." The Petitioners came to court expecting refunds and injunctive relief for the unconstitutional tax; the refunds and injunctive relief were authorized by statute; and the credit statute did not exist at the time the Petitioners paid the unconstitutional taxes. Therefore, the Petitioners are owed the statutory relief originally provided.

Procedural Reason for Accepting the Case for Review

An unequivocal definition of the requirements of a constitutional remedy for an unconstitutional tax and a mandate to the states to provide this relief is also necessary because of the limited forums available to a taxpayer to pursue its remedies. A taxpayer generally cannot challenge the constitutionality of a state or local tax in the lower federal courts. U.S. Const. amend. XI; 28 U.S.C. § 1341. The Eleventh Amendment[6] prohibits suits for monetary damages against a state in federal court and thus prevents all suits for state tax refunds. *Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 462 (1945). The Tax Injunction Act, as interpreted, prohibits taxpayers from bringing any action in federal court if there is a "plain, speedy, or efficient" remedy at state law, *Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 442, 444 (1998). Most of the cases interpreting the Tax Injunction Act have determined that state refund or protest systems are plain, speedy and efficient and thus jurisdiction in the federal courts is generally prohibited. *See, e.g., id.; California v. Grace Brethren Church*, 457 U.S. 393 (1982). While this Court has accepted several state tax cases in each of its terms in recent memory, review by this Court is anything but guaranteed. Thus, taxpay-

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[6] "[J]udicial power . . . shall not . . . extend to any suit . . . commenced or prosecuted against one of the United States Citizens." U.S. Const. amend. XI.

ers are usually limited to a state court as the final arbiter of what is an adequate remedy. In order to ensure that these state courts provide a constitutionally sufficient remedy, COST respectfully requests this Court to accept this case for review.

Finally, the constitutionality of a retroactive remedy imposed in lieu of statutory remedies which requires new, burdensome, and unexpected record keeping and proof requirements needs to be addressed by this Court because state courts addressing similar remedies for similar taxes have reached contrary results. In the case at bar, the Washington Supreme Court approved of the retroactive application of the credit as the sole remedy for the unconstitutional tax. In *General Motors Corp. v. City and Cty. of San Francisco*, 69 Cal. App. 4th 448 (1999).[7] the California Court of Appeal came to the opposite conclusion and mandated full refunds rather than the taxing authority's proffered conditional, partial refunds. Thus, Washington and California courts have adopted different standards for what constitutes a constitutional remedy and this difference can be reconciled only in this Court.

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[7] Like *Tyler Pipe*, the tax at issue in *General Motors* was also a tax on manufacturing and selling activities with the local manufacturers exempt from the selling tax. Once the tax was declared unconstitutional, the City in *General Motors*, like Washington here, provided no refund or assessment abatements but instead offered a retroactive partial refund if the taxpayer met certain record-keeping requirements and proved payment of other taxes.

CONCLUSION

For the reasons stated above, and because taxpayers throughout the country have a significant concern over the current refusal by states to provide truly meaningful, clear and certain remedies for unconstitutional taxes, COST respectfully requests the Court to accept this case for review.

Respectfully submitted,

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